(19,127.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 137.

THE CITY OF OKLAHOMA CITY, PLAINTIFF IN ERROR,

vs.

FRANK McMASTER.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } Return on Writ of Error.

In pursuance to the command of the writ of error within, I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, herewith transmit a true and correct copy of the opinion and judgment of the supreme court of the Territory of Oklahoma, together with a true copy of all of the records and proceedings and all pleadings, papers and files in said cause filed and recorded in my office as clerk of said court in the above entitled cause and I also transmit herewith the copy of assignment of errors and original writ of error and citation and proof of service thereof in said cause, lately pending in the supreme court of the Territory of Oklahoma, and also one of the copies of the brief of plaintiff in error first originally filed in said cause on December 6th, 1901, all under my hand and the seal of said court.

Witness my official signature and the seal of said supreme court at the city of Guthrie in said Territory of Oklahoma, this 28th day of October, in the year of our Lord, one thousand, nine hundred and three.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

b In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frank McMaster, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein The City of Oklahoma City is plaintiff in error and you are the defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the

said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma this tenth day of October, A. D. 1903.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

I hereby acknowledge service of the above and foregoing citation this — day of October, A. D. 1903.

——— ———,
Defendant in Error.

c TERRITORY OF OKLAHOMA, } ss:
County of Comanche, }

Received the annexed citation on the 13" day of October, 1903, and served the same on Frank McMaster therein named, by delivering to him a certified copy of this citation, with all the endorsements thereon, on the 14" day of Oct. 1903, in said county dated this 14 day of October, 1903.

C. C. HAMMONDS,
Sheriff of Comanche Co., O. T.
By E. E. JAYNE,
Deputy Sheriff.

Fees.

1st person	50
1 copy	25
Total	75

d [Endorsed:] 1126 City of Oklahoma City, *vs.* Frank McMaster Citation and service thereof. Filed Oct, 15 1903 Benj. F. Hegler clerk supreme court. By Jessie Pardoe deputy.

1 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

Petition for Writ of Error and Appeal.

To the honorable supreme court of the Territory of Oklahoma:

The above named plaintiff in error, conceiving itself aggrieved by the judgment of the supreme court of the Territory of Oklahoma

rendered on the sixth day of June, 1903, affirming judgment of the district court of Oklahoma county, in the Territory of Oklahoma, in rendering and entering a certain judgment for the defendant in error and the orders therein, for the recovery of certain real estate described in the petition of the defendant in error and in said judgment, and for the possession of said real estate, and for damages for the use of said property, and costs, and in overruling the motion of plaintiff in error for a new trial in said cause and in not sustaining the demurrer filed by the plaintiff in error to the petition of said defendant in error, and in sustaining the motion of the defendant in error to vacate a certain order and judgment rendered in said cause granting plaintiff in error, the defendant in the trial court, a second trial in said cause, and in reinstating the judgment rendered in the trial court for the recovery of said real estate and damages, and in admitting in evidence against the plaintiff in error, and over its objection on the trial of the said cause, a copy of a certain pretended judgment of the district court of Canadian county, purporting to have been rendered in the district court of Canadian county,
2 in an action in which this defendant in error was plaintiff and the Townsite Trustees Edgar N. Sweet, Levi E. Coe, and David H. Hammonds of Board No. 2, and their successors, were defendants, and in admitting evidence against the plaintiff in error and over its objections a copy of a certain order for a judgment, purporting to be a judgment or order of the district court of Canadian county, made in Kingfisher county in an action in which said defendant in error was the plaintiff and the said Townsite Trustees Edgar N. Sweet, Levi E. Coe, and David H. Hammonds of Board No. 2, and their successors, were the defendants, and in the admission of incompetent, irrelevant and immaterial evidence upon the trial of said cause, and in not rendering judgment in said cause for the plaintiff in error on the evidence introduced on the trial of said cause and in rendering judgment against the plaintiff in error and in favor of the defendant in error, does hereby prosecute proceedings in error and appeal from said orders, judgments and decrees of the supreme court of the Territory of Oklahoma, to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith and made a part hereof, and he prays that a writ of error and appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said judgment of affirmance was made, duly authenticated by the clerk of this court, may be sent to the Supreme Court of the United States and that the court may affix a supersedeas bond of the said plaintiff in error, to be given upon a reasonable time and enter the necessary orders herein, allowing and effecting proceedings in error and appeal and that the
3 said judgment of the supreme court of the Territory of Oklahoma be reversed and a judgment and decree be made remanding said cause for the further proceedings in error and appeal in the supreme court of the Territory of Oklahoma and in the trial

court and for new trial therein, or that such other decree may be made as — said honorable court may seem legal, just and proper.

A. G. C. BIERER,
DALE & BIERER, AND
C. PORTER JOHNSON,
Attorneys for Plaintiff in Error.
S. A. McGINNIS,
City Attorney in and for Oklahoma City, O. T.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Petition for writ of error and appeal. Filed Oct. 10—1904—Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

4 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

G. B. Stone, being first duly sworn says: That he is a resident of Oklahoma City in Oklahoma county in Oklahoma Territory, and is well acquainted with the premises involved in this action, being a tract of land in the southeast quarter of section thirty-three (33) in township twelve (12) north of range three (3) west in Oklahoma county, Oklahoma Territory, more particularly described as follows: Commencing at a point in said city of Oklahoma City on the southeast corner of block twenty-three (23) as shown by the trustees' plat, being now in use of said city and running thence southerly on a straight line with the west line of Broadway street as shown by said plat thirty-three and ten one-hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning one hundred and forty (140) feet; thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with said east and west line first named one hundred and forty (140) feet; thence north parallel with the said north and south line fifty (50) feet to the place of beginning, and that he is acquainted with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of said land in question, as well as the value of said described tract and that said tract of land is of the market value and is reasonably worth at least six thousand dollars ($6000.00) and that the value of said tract of land exceeds five thousand dollars ($5000.00) and that
5 the amount in controversy between the parties hereto, exclusive of costs and interest, is more than five thousand dollars ($5000.00).

G. B. STONE.

Subscribed and sworn to before me this 6th day of October A. D. 1903.

H. M. BATCHELDER,
Notary Public.

My com. expires Mar. 16, 1907.

[SEAL.]

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Affidavit of G. B. Stone, as to amount in controversy—Filed Oct. 10, 1903—Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

6 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

F. M. Gault being first duly sworn, says: That he is a resident of Oklahoma City in Oklahoma county, in Oklahoma Territory, and is well acquainted with the premises involved in this action, being a tract of land in the southeast quarter of section thirty-three (33) in township twelve (12) north of range three (3) west in Oklahoma county, Oklahoma Territory, more particularly described as follows: Commencing at a point in said city of Oklahoma City on the southeast corner of block twenty-three (23) as shown by the trustees' plat, being the plat now in use of said city and, running thence southerly on a straight line with the west line of Broadway street, as shown by said plat, thirty-three and ten one-hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning one hundred and forty (140) feet; thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with said east and west line first named, one hundred and forty (140) feet; thence north parallel with the said north and south line fifty (50) feet to the place of beginning, and that he is acquainted with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of said land in question, as well as the value of said described tract and that said tract of land is of the market value and is reasonably worth at least six thousand dollars ($6000.00) and that the value of
7 said tract of land exceeds five thousand dollars ($5000.00) and that the amount in controversy between the parties hereto, exclusive of costs and interest, is more than five thousand dollars ($5000.00).

F. M. GAULT.

Subscribed in my presence and sworn to before me this 6th day of October, A. D. 1903.

[SEAL.] N. E. DE MOSS,
Notary Public.

My com. expires Sept. 10, 1907.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Affidavit of F. M. Gault as to amount in controversy.—Filed Oct. 10, 1903—Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, *deputy*.

8 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

C. F. Colcord, being first duly sworn, says: That he is a resident of Oklahoma City in Oklahoma county in Oklahoma Territory, and is well acquainted with the premises involved in this action, being a tract of land in the southeast quarter of section thirty-three (33) in township twelve (12) north of range three (3) west in Oklahoma county, Oklahoma Territory, more particularly described as follows: Commencing at a point in said city of Oklahoma City on the southeast corner of block twenty-three (23) as shown by the trustees' plat, being the plat now in use of said city and running thence southerly on a straight line with the west line of Broadway street as shown by said plat, thirty-three and ten one-hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning one hundred and forty (140) feet; thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with said east and west line first named one hundred and forty (140) feet; thence north parallel with the said north and south line fifty (50) feet to the place of beginning, and that he is acquainted with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of said land in question, as well as the value of said described tract and that said tract of land is of the market value and is reasonably worth at least six thousand dollars ($6000.00) and that the
9 value of said tract of land exceeds five thousand dollars ($5000.00) and that the amount in controversy between the parties hereto, exclusive of costs and interest, is more than five thousand dollars ($5000.00).

C. F. COLCORD.

Subscribed and sworn to before me this 6th day of October A. D. 1903.

EDWIN G. BEDFORD,
Notary Public.

[SEAL.]

My com. expires May 15, 1907.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Affidavit of C. F. Colcord as to amount in controversy—Filed Oct. 10, 1903—Benj. F. Hegler, clerk supreme court by Jessie Pardoe, deputy.

10 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

J. L. Wilkin being first duly sworn says: That he is a resident of Oklahoma City in Oklahoma county, in Oklahoma Territory, and is well acquainted with the premises involved in this action, being a tract of land in the southeast quarter of section thirty-three (33) in township twelve (12) north of range three (3) west in Oklahoma county, Oklahoma Territory, more particularly described as follows: Commencing at a point in said city of Oklahoma City on the southeast corner of block twenty-three (23) as shown by the trustees' plat, being the plat now in use of said city, and running thence southerly on a straight line with the west line of Broadway street, as shown by said plat, thirty-three and ten one-hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning; thence west from said place of beginning one hundred and forty (140) feet; thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with said east and west line first named, one hundred and forty (140) feet; thence north parallel with the said north and south line fifty (50) feet to the place of beginning, and that he is acquainted with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of said land in question, as well as the value of said described tract and that said tract of land is of the market value and is reasonably worth at least six thousand dollars ($6000.00) and that the
11 value of said tract of land exceeds five thousand dollars ($5000.00) and that the amount in controversy between the parties hereto, exclusive of costs and interest, is more than five thousand dollars ($5000.00).

J. L. WILKIN.

Subscribed in my presence and sworn to before me this 6th day of October A. D. 1903.

GEO. L. COOK,
[SEAL.] *Notary Public.*

My com. expires Dec. 2, 1903.

Endorsed: 1126—City of Oklahoma City *vs.* Frank McMaster—Affidavit of J. L. Wilkin as to amount in controversy—Filed Oct. 10, 1903—Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

12 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error, *vs.* FRANK MCMASTER, Defendant in Error.	Assignments of Error in the Supreme Court of the United States on Error and Appeal of the December Term, in the Year of Our Lord One Thousand Nine Hundred and Three.

Afterwards, to-wit: upon the first Monday of December, in this same term before the justice- of the Supreme Court of the United States at the Capitol in the city of Washington, comes the said City of Oklahoma City, by Frank Dale and A. G. C. Bierer and S. A. McGinnis, and C. Porter Johnson, its attorneys, and says, that in the record and proceedings aforesaid there is manifest error in this, to-wit:

1st. That the said supreme court of the Territory of Oklahoma erred in affirming the judgment rendered in said cause in the district court of Oklahoma county, Oklahoma Territory.

2nd. That the supreme court of the Territory of Oklahoma erred in affirming the judgment of the district court of Oklahoma county in overruling the motion of plaintiff in error for a new trial therein.

3rd. The supreme court of the Territory of Oklahoma erred in affirming the judgment of the district court of Oklahoma county in overruling the demurrer filed by the plaintiff in error to the petition of said defendant in error.

4th. The supreme court of the Territory of Oklahoma erred in affirming the judgment of the trial court of Oklahoma county in sustaining the motion to vacate the order of the trial court in sustaining the demand of plaintiff in error in the trial court for a second trial of said cause and setting aside the judgment rendered therein and granting a second trial to plaintiff in error had in the trial court.

5th. That the supreme court of the Territory of Oklahoma erred in affirming the judgment of the trial court in reinstating
13 the judgment against the plaintiff in error upon the motion of defendant in error, after said judgment had been by its own

terms and provisions set aside and vacated and a second trial of said action awarded as provided in said judgment.

6th. That said supreme court of the Territory of Oklahoma erred in affirming the judgment and rulings of the trial court in admitting in evidence against this plaintiff in error and over its objection at the trial of said cause a copy of certain findings made by the district court of the second judicial district of Canadian county, Oklahoma Territory, in an action in which Frank McMaster was plaintiff and Edgar N. Sweet, Levi E. Coe, and David H. Hammond, constituting the trustees of board No. 2, of the townsite trustees and which findings are as follows, to-wit:

In the District Court, 2nd Judicial District, County of Canadian, Territory of Oklahoma.

FRANK MCMASTER
vs.
TOWNSITE TRUSTEES.

FRANK MCMASTER, Plaintiff,
vs.
EDGAR N. SWEET, LEVI E. COE, DAVID H. HAMMONS, Defendants.

This case coming on to be heard before the Hon. J. H. Burford, judge of said court on the pleadings and evidence herein, the court finds that the defendants were trustees of the townsite of Oklahoma City in said county for the benefit of the actual occupants thereof under the act of Congress approved May 14th, 1890.

That on the 3rd of September 1890 said trustees entered at the land office of the United States at Oklahoma City, O. T., the S. E. ¼ sec. 33 twp. N. 12 range 3 west of the Indian meridian in trust for the use and benefit of the occupants thereof and that a patent has been issued to said trustees for said land to be conveyed by them to the occupants thereof as their several interests should appear at the date of said entry.

That said tract of land was on the 22nd day of April, 1889, open to settlement under the act of Congress approved March 2nd, 1889, and that such tract of land was settled upon and occupied as a townsite shortly after noon of said day and has continued to be and is now held and occupied.

That a portion of the occupants of said tract on said 22nd day of April 1889 agreed tacitly to the plat of said tract of land conveying lots, blocks, streets and alleys and that the plaintiff herein on said day lagally entered upon and occupied and has since continued to claim the piece or parcel of ground particularly described in the complaint as his lots.

That said piece or parcel of ground at that time was lots 1 and 2 in block 24 according to the plat so agreed upon. That the Ex-

hibit "A" attached to the complaint is a correct copy of
14 said plat.

That subsequently to such occupancy and prior to the conveyance to said trustees a different plat and arrangement of the streets, lots, blocks and alleys was adopted and enforced by the parties occupying the said townsite.

That by such plat the parcel of land claimed by the plaintiff was thrown into the street called Grand avenue. That plaintiff did not consent but objected to said second plat and has never consented thereto or acquiesced.

That said tract of land is described as follows, according to the said last named plat, commencing at a point on the S. E. corner of block 23 according to the present plat and running southerly on a line with the west line of Broadway, thirty three and 10/100 feet from said southeast corner of said block 23, thence west from said west line of Broadway 140 feet, thence south 50 feet, thence east 140 feet and thence north 50 feet to the place of beginning.

That thereafter he was by parties recognized, by said authorities forcible removed from said parcel of ground and has since that time been forcibly kept from the occupancy of said tract.

That on the 21st day of April, 1891, this plaintiff applied to said defendants as such trustees for deed to said lot but said trustees found the facts substantially as above stated but declined to award him a deed for said lot or any part thereof.

That said city of Oklahoma City has appropriated said lots to *his* own purpose as a street and so appropriated the same long prior to the conveyance of said tract by the United States to said trustees.

That C. G. Jones, A. C. Scott and Moses Neal are the successors in said trust of said defendants.

That said plaintiff was not an occupant of said tract of ground at the time the United States conveyed the same to the defendants as trustees but said portion of said tract was at the time used and occupied as street by said city.

JOHN H. BURFORD, *Judge.*

TERRITORY OF OKLAHOMA, }
Canadian County, } *ss:*

I, Benj. F. Hegler, clerk district court in and for the county and Territory aforesaid do hereby certify that the above and foregoing is a full and correct copy of an order and decree of the court in the above entitled case as the same appears of record on Order Book 1, page 427 in my office.

Witness my hand and seal of said court hereto affixed at my office in El Reno this 11th day of May 1892.

BENJ. F. HEGLER,
Clerk Dist. Court,
By E. R. FISCHER, *Deputy.*

TERRITORY OF OKLAHOMA, }
County of Oklahoma. }

This instrument filed for record on this 14th day of May 1892, at 1:30 o'clock p. m.

R. H. MANSUR,
Register of Deeds.""

15 7th. That the said supreme court of the Territory of Oklahoma erred in affirming the judgment and order of the trial court in said action in admitting in evidence against this plaintiff in error and over its objections a copy of a certain order or judgment rendered and entered in said cause of Frank McMaster, plaintiff, *vs.* Edgar N. Sweet, Levi E. Coe, and David H. Hammons, townsite, trustees board No. 2, and their successors, defendants, and which order is as follows, to-wit:

"In the District Court, Canadian County, Second Judicial District, Oklahoma Territory.

FRANK MCMASTER
vs.
EDGAR M. SWEET, LEVI E. COE, and DAVID H. HAMMONS, Townsite Trustees, Board No. 2, and Their Successors.

On motion in this cause, on the 13th day of October, 1893, being one of the regular days of said court at Kingfisher in Kingfisher county in open court, the same being then in session, the following proceedings were had: It is ordered herein that said defendants make, execute and deliver to Frank McMaster, plaintiff herein, a trustees' deed as decreed by this court on the 14th day of November 1892 of the following described premises and real estate, to-wit: Commencing at a point on the southeast corner of block (23) twenty three as shown by the trustees' plat of Oklahoma City, O. T. running thence southerly on a straight line with the west line of Broadway as shown by said trustees' plat thirty three and ten one hundredths (33 10/100) from said southeast corner of the block aforesaid to the place of beginning; thence west one hundred and forty feet (140) thence south at right angles with the line aforesaid fifty (50) feet; thence east parallel with the aforesaid east and west street line one hundred and forty feet (140); thence north to the place of beginning fifty feet (50). Provided, however, that the said plaintiff, shall fully — all costs of said trustees in the making of the deed herein ordered.

In witness whereof I have hereunto set my hand and caused the seal of said court to be affixed this the thirteenth day of October, 1893.

JOHN H. BURFORD, *Judge.*

TERRITORY OF OKLAHOMA, } ss:
County of Kingfisher, }

I, Benj. F. Hegler, clerk of the district court of the 2nd judicial district *and* in and for said county and Territory hereby certify that the within and foregoing is a full true and complete copy of the order this day made in the above entitled cases as the same appears on file and of record in my office.

16 In witness whereof I hereto set my hand and the seal of said county at Kingfisher this 13" October, 1893.

[SEAL.] BENJ. F. HEGLER,
Clerk of Second Dist., O. T."

8th. That said supreme court erred in affirming the judgment of the trial court in admitting evidence on the trial of said cause on the part of the defendant in error and over the objections and exceptions of plaintiff in error.

9th. That the said supreme court erred in affirming the judgment of the trial court in rendering the judgment in said cause against this plaintiff in error and in favor of the defendant in error.

10th. That said supreme court erred in affirming the judgment of the trial court in not rendering judgment in said cause for plaintiff in error on the evidence introduced on the trial of said cause.

11th. That said supreme court of the Territory of Oklahoma erred in holding and deciding as a matter of law in this case that where a claim is entered upon public lands which are opened to settlement and a party has made settlement thereon for homestead purposes and has legal rights therein, such rights can not be taken from him for public use, except by due process of law and the payment of just and reasonable compensation therefor in this that said principle of law is not applicable to this case because the defendant in error did not claim any rights to the property by virtue of settlement made under the homestead law of the United States, but claimed a right thereto as a townsite occupant and said supreme court erred in holding and deciding that the defendant in error had a vested right in and to the land in controversy under the facts of this cause.

12th. That said supreme court of the Territory of Oklahoma erred in holding that the townsite trustees of said board of trus-

17 tees No. 2, assigned to townsites in Oklahoma, were such to satisfy a land or law claimant, prior to the time that said trustees had the title conveyed in them for a trust purpose and that any subsequent grantee of the townsite trustees would be bound by such judgment rendered against said townsite trustees.

13th. That said supreme court of the Territory of Oklahoma erred in holding as a matter of law that the finding of facts made by the district court of Canadian county in an action by said defendant in error, Frank McMaster against said Board of Townsite Trustees,

Board No. 2, composed of Edgar N. Sweet, Levi E. Coe, and David H. Hammonds, constituted a judgment and a final conclusion of said district court of Canadian county and that said findings were competent evidence in this cause in the trial court.

14th. That the said supreme court of the Territory of Oklahoma erred in holding as a matter of law that the plat made by said board No. 2, of the townsite trustees platting the land patented to said trustees for townsite purposes into lots, blocks, streets and alleys, did not legally vest the title to the streets so platted for public purposes and in holding that the property of the plaintiff in the trial court and which was located in a street so platted was taken from the defendant in error without due process of law.

15th. That said supreme court of the Territory of Oklahoma erred as a matter of law in holding and deciding that the defendant in error Frank McMaster plaintiff in the trial court had a vested interest in the land in controversy and which was composed of parcels of land which was located in a street in Oklahoma City, as
18 shown and declared by the plat approved by the said board of townsite trustees, constituted and appointed under act of Congress in May 14th, 1890, governing townsites in Oklahoma Territory.

16th. That said supreme court of the Territory of Oklahoma erred in not holding as a matter of law that when the board of townsite trustees constituted and appointed under the act of Congress May 14th, 1890, governing townsites in Oklahoma Territory, that all of the lands so located in the streets as shown by the plat approved by said trustees was vested in the public for the public use and devoted to public use as a public street and highway.

19 17th. That said supreme court of the Territory of Oklahoma erred in holding as a matter of law that defendant in error, plaintiff in the trial court, had a vested interest in the land in controversy called lots, but which it appears was located in a street in the townsite of Oklahoma City when the said land was platted by the trustees of said townsite and the plat approved by said trustees and in holding that a vested interest could be obtained in and to a part of said townsite which, when the same was platted by said trustees, was shown to be in a street of said townsite.

18th. That the said supreme court of the Territory of Oklahoma erred in holding as a matter of law that a person who was not in possession of part of said townsite at the time the same was patented to the townsite trustees in trust for the use and benefit of the occupants thereof for public purposes, including the location of streets and alleys had or could have a vested interest in said townsite and, particularly in a part of said townsite which had been by the occupants of said townsite prior to the patent thereof for the use and benefit of the occupants and public purposes, devoted to the public for use as a street.

19th. That the said supreme court of the Territory of Oklahoma erred in rendering a judgment against the plaintiff in error and in decreeing that it unlawfully and wrongfully withheld the title and possession of the tract of land in controversy from the defendant in error; whereas the said municipal corporation had not been vested with the fee to said street, so as to enable the plaintiff in the trial court to maintain an action against it for the title thereto.

20th. That the value of the land and the matter in controversy in this action exceeds five thousand dollars ($5000.00) as appears by affidavits presented in the records of this cause.

21st. That the said supreme court of the Territory of Oklahoma erred in holding and deciding as a matter of law that the plaintiff in error, here plaintiff in error in the supreme court of the Territory of Oklahoma had waived and abandoned the assignments of error made by this plaintiff in error in said supreme court of Oklahoma and which are embraced within "the first and second assignments of error as herein set forth," as stated in the opinion of the supreme court of Oklahoma and in holding and deciding that the plaintiff in error had abandoned the following assignments of error as contained in the petition in error in this cause in the supreme court of Oklahoma Territory, to-wit:

First. Overruling the demurrer of defendant to plaintiff's petition.

Second. Error of the court in setting aside the order of the court made granting a new trial to the defendant as a matter of course without showing cause entered in the journal and in re-instating the judgment in favor of the plaintiff; and

Third. Error of the court in rendering judgment in favor of the plaintiff instead of the defendant.

22nd. That the supreme court of the Territory of Oklahoma erred in holding that the plaintiff in error had waived and abandoned its assignment of error upon the record of the trial court in overruling the demurrer of the defendant to plaintiff's petition.

23rd. That the supreme court of the Territory of Oklahoma erred in holding and deciding in its opinion that the plaintiff in error had abandoned its assignment of error in that the trial court erred in setting aside the order of the court made granting a new trial to the defendant as a matter of course without showing cause entered in the journal and in re-instating the judgment in favor of the plaintiff in the trial court.

Wherefore the plaintiff in error prays that the judgment of the supreme court of the Territory of Oklahoma herein may be reversed, annulled and held for naught and that the plaintiff in error may be restored to all things which it has lost by occasion of said judgment, and that the errors of the supreme court of the Territory of Okla-

homa be fully corrected and that judgment be entered dismissing the cause of action of defendant in error.

S. A. McGINNIS,
City Attorney in and for Oklahoma City, O. T.
FRANK DALE,
A. G. C. BIERER, AND
C. PORTER JOHNSON,
Attorneys for Plaintiff in Error.

Endorsed: 1126. The City of Oklahoma City, *vs.* Frank McMaster. Assignment of error. Filed Oct. 10, 1903, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

20½ In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } Order.

Now on this tenth day of October, A. D. 1903, comes the plaintiff in error by its attorneys Frank Dale and A. G. C. Bierer, and files herein and presents to the court its petition and assignments of error praying an allowance of a writ of error, and that the transcript of the record and proceedings duly authenticated may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as may be proper in the premises.

Upon proper consideration whereof, the court and the undersigned chief justice thereof, does allow the writ of error and appeal and directs and commands the clerk of this court to transmit to the said Supreme Court of the United States a true and certified transcript of the record and all papers, files and proceedings herein.

It is further ordered that the plaintiff in error shall give bond in the sum of three thousand dollars ($3000.00) to be approved by the clerk of this court within twenty (20) days from this date and upon so doing these proceedings in error and appeal and the said bond shall operate as a supersedeas as a stay of all proceedings herein in the supreme court of the Territory of Oklahoma and in the district court of Oklahoma county, pending said cause in the Supreme Court of the United States.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: 1126—The City of Oklahoma City *versus* Frank McMaster—Order allowing writ of error—Filed Oct. 10, 1903, Benj. F. Hegler, clerk supreme court.

21 In the Supreme Court of the United States of America.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error, *vs.* FRANK MCMASTER, Defendant in Error.	Writ of Error to the Supreme Court of the Territory of Oklahoma.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said court before you, in which the value of the land and the matter in controversy exceeds five thousand dollars ($5000.00) and wherein it appears that the land and the possession thereof is involved, a manifest error hath happened to the great damage of the said City of Oklahoma City as by its complaint and assignment of error appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, command you, if judgment therein be given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States with this writ so that you, have the same at Washington on the ninth day of November next, in the said Supreme Court to be then and there held.

That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States and of said Territory should be done.

It is further ordered and commanded that mandate and execution of said judgment of the supreme court of the Territory of Oklahoma be stayed until a final determination of this cause upon condition that the said plaintiff in error enter into a good and sufficient undertaking to the defendant in error in the sum of three thousand dollars, conditioned as required by law within twenty (20) days.

Witness the Honorable John H. Burford, chief justice of
22 the supreme court of the Territory of Oklahoma this tenth day of October, in the year of our Lord one thousand nine hundred and three.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed:
By JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Filed October tenth, A. D. 1903.
BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

[Endorsed:] 1126 The City of Oklahoma City *versus* Frank McMaster. Writ of error. Filed Oct. 10 1903. Benj. F. Hegler, clerk supreme court. By —— —— deputy.

23 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } Bond on Appeal.

Know all men by these presents, that we, The City of Oklahoma City as principal, and Seymour C. Heyman and C. B. Ames as sureties, are held and firmly bound unto Frank McMaster in the full and just sum of three thousand ($3000.00) dollars, to be paid to the said Frank McMaster, his certain attorney, administrator or assigns, to which payment well and truly to be paid, we bind ourselves, our executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of October, A. D. 1903.

Whereas, lately at a term of the supreme court of Oklahoma in a suit pending in said court, wherein The City of Oklahoma City is plaintiff in error and Frank McMaster is defendant in error, judgment was rendered in said court on the sixth day of June A. D. 1903, in favor of said defendant in error and against the said plaintiff in error and the said plaintiff in error having obtained a writ of error from the Supreme Court of the United States for the reversal of said judgment and an order of the supreme court of the Territory of Oklahoma staying mandate and execution of said judgment upon the giving by plaintiff in error of a good and sufficient bond in the sum of three thousand dollars, and citation having been issued upon said writ of error, and served upon Frank McMaster, defendant in error, citing and admonishing the said defendant in error to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday of December next.

24 Now, the condition of the above obligation is such that if said City of Oklahoma City shall prosecute its said writ of error to effect and answer all damages and costs, if it fail to make its — appear good, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands this 14th day of October A. D. 1903.

THE CITY OF OKLAHOMA CITY,
By LEE VAN WINKLE, *Mayor.*
T. A. BLAISE, *City Clerk.*

[SEAL.]

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I hereby approve the within bond and sureties thereto this 14 day of October, 1903.

BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

SEYMOUR C. HEYMAN AND
C. B. AMES, *Sureties.*

TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

Seymour C. Heyman and C. B. Ames being duly sworn, each for himself says:

That he is worth the sum of five thousand dollars ($5000.00) over and above all just debts, liabilities and exemptions.

SEYMOUR C. HEYMAN.
C. B. AMES.

Subscribed and sworn to before me this 14th day of October, 1903.

[SEAL.] N. E. DE MOSS,
Notary Public.

My commission expires 10 of September, 1903.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Bond on appeal—The within bond approved by me this Oct. 14, 1903. Benj. F. Hegler, clerk supreme court—Filed Oct. 15, 1903—Benj. F. Hegler, clerk supreme court.

25 The supreme court of this Territory having affirmed the judgment in the case of McMasters *vs.* Oklahoma City, and the mayor and city attorney, being the special committee to whom the question of the future disposition of said cause was referred having recommended that said cause be appealed to the Supreme Court of the United States; and the council concurring in said recommendation; therefore be it resolved by the city council of Oklahoma City, that the employment of Messrs. Dale & Bierer and C. Porter Johnson, to assist the city attorney in prosecuting said appeal, be and the same is hereby approved and the mayor and city clerk are hereby authorized to sign all bonds or other papers necessary to perfect said appeal, and that the mayor and city attorney be hereby authorized to do and perform any and all other acts found necessary to carry into effect the object and purposes of these resolutions.

Approved Oct. 13, 1903.

LEE VAN WINKLE, *Mayor.*

Attest:
[SEAL.] T. A. BLAISE, *City Clerk.*

I hereby certify that the above and foregoing is a true correct and complete copy of a resolution adopted by the city council of the city of Oklahoma City, O. T., in regular session assembled on the 12th day of October, 1903, as the same appears of record on file in my office.

[SEAL.]

T. A. BLAISE,
City Clerk of said City.

Endorsed: 1126—The City of Oklahoma City *vs.* Frank McMaster—Approving employment of counsel—Filed Oct. 15, 1903,—Benj. F. Hegler, clerk supreme court.

26 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error, *vs.* FRANK MCMASTER, Defendant in Error.	No. 1126. Petition in Error.

The said plaintiff in error, The City of Oklahoma City, a municipal corporation and city of the first class, of Oklahoma Territory, situated in Oklahoma county in said Territory, complains of the said Frank McMaster, defendant in error, for that the said defendant in error at the regular February, 1900, term of the district court of the third judicial district of the Territory of Oklahoma, sitting within and for the county of Oklahoma, recovered a judgment in said county against the said plaintiff in error in a certain action then pending in said court, wherein the said Frank McMaster was plaintiff and The City of Oklahoma City aforesaid was defendant.

The original case made in this cause duly certified and attested is hereunto attached, marked Exhibit "A" and made a part of this petition in error, and the said plaintiff in error, The City of Oklahoma City aforesaid, has appealed and does hereby appeal from the said judgment to the supreme court of the Territory of Oklahoma, and alleges, avers and states that there is error in said record and proceedings in this to-wit:

First. The said district court erred in overruling the motion of the plaintiff in error for a new trial.

27 Second. The said district court erred in not sustaining the demurrer filed by the plaintiff in error to the petition of said defendant in error.

Third. The said district court erred in reinstating the judgment against said plaintiff in error upon the motion of said defendant in error after said judgment had been by its own terms and provisions set aside and vacated and a second trial of said action awarded as provided in said judgment.

Fourth. The said district court erred in admitting in evidence against said plaintiff in error, and over its objection on the trial of

said cause, the copy of a certain pretended judgment of the district court of Canadian county purporting to have been rendered in an action in said last named court in said Canadian county district court, in which said defendant in error was plaintiff and "Townsite Trustees," Edgar N. Sweet, Levi E. Coe and David H. Hammons were defendants.

Fifth. Said district court erred in the trial of said action in admitting in evidence against said plaintiff in error and its objections, the copy of a certain order or judgment purporting to be a judgment or order of the district court of Canadian county made at Kingfisher county on the 13th day of October, 1893, in an action in which said defendant in error was plaintiff and Edgar N. Sweet, Levi E. Coe and David H. Hammons, townsite trustees, board No. 2 and their suc-essors were defendants.

Sixth. The said district court erred in admitting evidence in the trial of said cause on the part of said defendant in error.

Seventh. The said district court erred in not rendering judgment in said cause for the said plaintiff in error on the evidence
28 introduced on the trial of said action.

Eighth. The said district court erred in rendering judgment in said action against said plaintiff in error and in favor of said defendant in error.

Wherefore plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be ordered to be rendered in favor of the plaintiff in error and against the defendant in error upon the facts as disclosed by the record of case-made; and that the plaintiff in error be restored to all of the rights that said plaintiff in error may have lost by the rendition of the said judgment herein, and for such other and further relief as to the court may seem just and proper.

THE CITY OF OKLAHOMA CITY,
Plaintiff in Error,
By JNO. H. WRIGHT,
City Attorney of the City of Okla., and
DOUGLAS AND DOUGLAS,
Attorneys for Plaintiff in Error.

Filed Aug. 5 1901,
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

29 EXHIBIT "A."

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahoma County.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Case Made.

Be it remembered that on the 22nd day of Sept. 1899, the above named plaintiff commenced his action against the above named defendant by filing in said district court on that date, his petition, which is in words and figures following to-wit:

30 TERRITORY OF OKLAHOMA, }
Oklahoma County. }

In the District Court, 3rd District.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Petition.

Now comes the plaintiff herein complaining and says:

1st. That the defendant is a municipal corporation of Oklahoma Territory, being a city of the first class and located in Oklahoma county aforesaid.

2nd. That the plaintiff is the legal and equitable owner of the real estate herein described and fully entitled to the possession thereof and of which the defendant unlawfully keeps him out of the possession, being a part of the southeast quarter (¼) section thirty three (33), town 12 north, range 3 west in said county and Territory more particularly described as follows: Commencing at a point in said city on the southeast corner of block twenty three (23) as shown by the trustees' plat, being the plat now in use of said city and running thence southerly on a straight line with the west line of Broadway street as shown by said plat thirty three and ten one hundredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning: thence west from said place of beginning one hundred and forty (140) feet, thence south at a right angle with the line aforesaid fifty (50) feet, thence east parallel with said east and west line first named one hundred and forty (140) feet, thence north parallel with said north and south line fifty (50) feet to the place of beginning.

3rd. That prior to the filing hereof being far more than
31 four weeks thereto plaintiff presented his claim to defendant for uses, rents, and profits thereon, as well as a demand for possession of said real estate described as aforesaid but that defendant refused to pay said claim and still retains possession of said real estate to the damage of plaintiff in the sum of two hundred and fifty ($250) dollars per year since the 14th day of November 1892.

4th. Said real estate is further described on the "Dick" plat, being the original plat of said city as lots No. one (1), two (2) of block No. twenty four (24) of said plant as filed in the U. S. Land Office.

Wherefore plaintiff prays judgment herein against defendant.

1st. For the recovery of said real estate, and damages for withholding possession thereof.

2nd. For other and further relief.

FRANK McMASTER, *Plaintiff.*

H. H. HOWARD, *Attorney.*

No. 2053. Frank McMaster *vs.* Oklahoma City. Amended petition. Filed Sept. 22, 1899, B. D. Shear, clerk. H. H. Howard, att'y

32 And thereafter on the 10th day of October, 1899, the defendant herein filed its demurrer to plaintiff's petition filed herein on the 22nd day of Sept. 1899, in said cause, which demurrer is as follows to-wit:

33 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court.

FRANK McMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Demurrer.

Comes now the defendant, The City of Oklahoma City and demurs to the petition of the plaintiff filed on the 22nd day of September 1899, and for cause and grounds of said demurrer says:

That said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against said defendant.

THE CITY OF OKLAHOMA CITY, *Defendant,*
By JOHN H. WRIGHT AND
DOUGLAS AND DOUGLAS, *Its Attorneys.*

2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Demurrer. Filed in district court, Oklahoma county, O. T., October 10, 1899. B. D. Shear, clerk, by M. McKinley, deputy. Refiled by leave of court Nov. 20, 1899. D. B. Shear, clerk.

34 And thereafter on the 20th day of Nov. 1899, the following proceedings were had in said cause, to-wit:

35 FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Case No. 2053.

This cause came on to be heard by the court on demurrer of defendant to plaintiff's petition, and on consideration thereof, the same is by the court overruled, to which ruling the defendant excepted.

36 And thereafter on the 24th day of Nov. 1899, the defendant filed its answer in said cause herein, which is in words and figures as follows, to-wit:

37 TERRITORY OF OKLAHOMA, } *ss:*
County of Oklahoma, }

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Answer.

1. Now comes the said defendant, The City of Oklahoma City, and for answer to the petition of said plaintiff filed in said cause on the 22nd day of September, 1899, denies each and every allegation and averment therein contained except such as are hereinafter expressly admitted.

The said defendant admits that it is a municipal corporation and city of the first class as alleged in said plaintiff's petition.

2. The defendant further answering says that the tract and parcel of land claimed by said plaintiff and described in said plaintiff's said petition is a part of the original townsite of the city of Oklahoma City in the Territory of Oklahoma, and is situated in and is included in and is a part of Grand avenue, a public highway and street of said city, as the same appears on the original plat and survey of said city, which said plat and survey was approved by board No. 2, of townsite trustees of Oklahoma City on the 6th day of September, 1890, and recorded under and by the direction of said board in the office of the register of deeds of Oklahoma county, Territory of Oklahoma, on the 8th day of September, 1890, in Book No. *one* of plats of the records of said county at pages *2, 3 & 4* of said book.

That said public highway in said city, to-wit: said Grand avenue, with the said land claimed by plaintiff, included therein, was and had been for more than one year prior to the approval of said plat and survey by said board No. 2 of townsite trustees and *and*
38 the filing of said plat so approved in the office of the register of deeds of said Oklahoma county as aforesaid, and has been

at all times since, used and occupied exclusively as a public highway and street of said city by the inhabitants of said city and Territory at all times, and was so exclusively used as a public highway and street long before the organization of said city as a municipal corporation, and that said plaintiff was not during any time is possession of said parcel of land now claimed by him and had no interest therein.

Wherefore, defendant prays judgment for its costs herein against said plaintiff.

THE CITY OF OKLAHOMA CITY, *Plaintiff*,
By JNO. H. WRIGHT, *City Attorney, and*
DOUGLAS AND DOUGLAS, *Its Attorneys.*

#2053. Frank McMaster, plaintiff. *vs.* The City of Oklahoma City, defendant. Answer. Filed in district court, Oklahoma county, O. T. Nov. 24, 1899. B. D. Shear, clerk. By M. McKinley, deputy.

39 And thereafter on the 5th day of February 1900, plaintiff filed his reply in said cause which is in words and figures as follows to wit:

40 TERRITORY OF OKLAHOMA, *Oklahoma County,* } *ss:*

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } #2053. Replication.

Now comes plaintiff — for replication to the answer filed herein says:

He denies each and every allegation of said answer and every and all of the averments therein which contradict the averments counts and allegations of the plaintiff's petition filed herein.

Wherefore he the plaintiff prays judgment as asked in said petition.

FRANK McMASTER, *Plaintiff.*

H. H. HOWARD,
Att'y for Plaintiff.

#2053. Frank McMaster, *vs.* Oklahoma City. Replication Filed in district court, Oklahoma county, O. T., Feb. 5th, 1900. B. D. Shear, clerk. By M. McKinley, deputy. H. H. Howard, att'y.

41 And thereafter on the 15th day of February, 1900, the following proceedings were had in said cause, to-wit:

42 TERRITORY OF OKLAHOMA, } *ss*:
County of Oklahoma, }

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahoma County.

FRANK MCMASTER, Plaintiff,
vs.
CITY OF OKLAHOMA CITY, Defendant.

On this 15th day of February, 1900, at a regular term of the district court of the third judicial district held in and for Oklahoma county in the Territory of Oklahoma, the above entitled case came on for trial before the Hon. B. F. Burwell, presiding judge, and the plaintiff appeared in person and by its attorney- Howard and Ames, and the defendant by the city attorney, John H. Wright and Selwyn Douglas, its attorneys, and thereupon the following proceedings were had in said cause to-wit:

43 Mr. HOWARD: In behalf of the plaintiff, we first offer in evidence, the patent made to the townsite trustees by the Government. I have here simply a certified copy.

Mr. DOUGLAS: We do not object to it on the ground that it is not the original, but we do object to it for the reason that it does not tend to prove any issue in this cause, and is incompetent, irrelevant and immaterial.

Overruled by the court and defendant excepts.

Marked Exhibit "A."

Mr. HOWARD: I now desire to offer in evidence a judgment rendered in the case of McMaster *vs.* The Townsite Trustees by Justice John H. Burford on the 14th day of November, 1892,

To which defendant objects *to* as incompetent, irrelevant and immaterial, and the City of Oklahoma City not being a party to said cause.

By the COURT: Overruled. Let it be marked as an exhibit in the case. You will be given exceptions to all of these offers.

Marked Exhibit "B."

Here the plaintiff also offers in evidence a certificate of the register of deeds upon that judgment, showing that it has been recorded in his office in Oklahoma county wherein the land is situated.

Mr. DOUGLAS: Defendant objects as incompetent, irrelevant and *and* immaterial.

By the COURT: I will let that be marked under the same order.

To which the defendant excepts.

Plaintiff now offers in evidence a further order of the district — by Judge Burford, in the same case, dated October 13th, 1893, together with a certificate of the register of deeds of Oklahoma county, that the same has been recorded in his office.

44 To which defendant objects as incompetent, irrelevant and immaterial.

By the COURT: Let it be marked under the same rule.

To which defendant excepts.

Marked Exhibit "C."

JOHN HOLZAPPEL being called and sworn, testified as a witness in behalf of the plaintiff, as follows:

Q. What is your name?

A. John Holzappel.

Q. Where do you reside?

A. I live in Oklahoma City, Oklahoma county.

Q. How long have you lived here?

A. I have lived here since the 22nd day of April, 1889.

Q. What has been your business?

A. Real-estate and rentals.

Q. Are you acquainted with this property in controversy?

A. Why, is it the street corner?

Q. Yes?

A. Yes, I am acquainted with it.

Q. Do you know its reasonable rental value for that period?

Mr. DOUGLAS: From what time?

Q. Well, for any period?

Mr. D.: Let's have the time. Give some date.

Q. Do you know it for the last year?

A. Now what street are you talking about?

Q. That tract of land; that piece of land. Do you know what the rental value would be worth?

45 A. How large is it?

Q. 50 x 140 ft.

A. Why, I know as near as it could be gotten at, I should think.

Mr. DOUGLAS: I don't understand that the witness knows what property he is talking about.

Q. I understand this to be a piece of ground in the middle of Grand Ave. down here somewhere, part of the street. You say you know the rental value of that, do you?

A. I know about what a piece of ground there 50 x 140 feet would be worth, the rental value of it or thereabouts.

Q. What do you say, Mr. Holzappel, would be the rental value of that piece of ground since November 23, 1892?

To which defendant objects as incompetent, irrelevant and immaterial. Overruled by the court and defendant excepts.

Mr. DOUGLAS: I would like to be heard. I suppose that under the decisions of the court upon our statutes in regard to the recovery of lands in ejectment, and the recovery of rents and profits, they can't go back more than three years before the right of action com-

menced, unless they can show they are claiming under a written lease. I suppose they could not go back of the statute of limitations for the recovery of damages. They are asking for the rental value of it now in 1892; this suit wasn't commenced until 1897, '8 or '9. Now I suppose they couldn't go back of 1895 anyhow.

By the COURT: I think that was within three years prior to the bringing of the suit.

Q. You may state how much per year the rental value of those premises would have been worth, for the past 3, 4, 5, or 6 years?

46 Defendant objects as incompetent, irrelevant and immaterial; the witness hasn't shown himself able to say. Sustained; plaintiff excepts.

Q. Are you able to say what the reasonable rental value of this property would have been from the 3rd day of February, 1895?

A. Well, I would want to know a little more about it,—whether it fronts on a street, fronts on Broadway?

Q. A piece of ground 50 x 140, fronting on Broadway, running 140 feet west?

A. Yes, I would know what the reasonable value would be.

Q. Do you know where this land is situated?

A. Yes.

Q. What would be its value per year to the present from that time?

Defendant objects as incompetent, irrelevant and immaterial.

By the COURT: That confines it to within three years prior to the filing of the petition?

Mr. HOWARD: Yes.

Objection overruled by the court; defendant excepts.

A. I think $250 a year would be a reasonable rental value for that ground.

Cross examination:

Q. Where is that ground, John?

A. It is in Grand avenue, right north of the Batcheldor building.

Q. Is it a part of one of the principal highways of the city?

A. That is the way I understand it, yes, sir.

Q. Now just describe it by metes and bounds?

A. They asked for a piece of ground 50 ft. front by 140 deep, right there.

Q. Which way does it front?

47 A. Fronts east.

Q. Where does it stand; where is it?

A. I couldn't give you the metes and bounds of it. They asked for a piece of ground in that street there.

Q. Where is it to the block immediately south of it and the lots occupied by Gilpin and Frick's hardware store?

A. Well, the ground they spoke of is right immediately in front of Gilpin and Frick's hardware store.

Q. About how far north?

A. It runs up to it, I suppose.

Q. Well, do you know?

A. No, I don't know. I say I don't know the metes and bounds of it. I know where the ground is.

Q. Do you know how far south the line of this land counsel has described to you, that the plaintiff is claiming, how far south the line of that ground is from Gilpin and Frick's hardware store?

A. No, sir.

Q. Do you know how far the north line is from the other corner?

A. No, sir; I have my opinion but I don't know.

Q. You know nothing about it of your own personal knowledge?

A. Well, not about the metes and bounds; I never looked that up.

Q. Don't know how far the north line is from the city corner?

A. No, sir.

Q. Do you know about how far the south line of it is from the Gilpin and Frick block?

A. No, sir.

Q. How do you figure that that piece of land in the street there is worth $250 a year; do you figure that it is worth that to you to drive over?

48 A. No sir, I figure that if a man had that he could either lease the ground to somebody to build on or build on himself and bring him that much.

Q. Build on it there in the middle of Grand avenue?

A. I am not discussing that part of it.

Q. If there was a building put on there, would it shut up Grand avenue at that point?

A. I suppose it would—to some extent, anyway.

Q. How much of the street would it leave there?

A. 100 feet of ground wouldn't leave any street.

Q. It would just block up one of the principal streets of the town,—the streets now occupied?

A. Yes sir.

Q. How long has that street—Grand avenue—been occupied as a street by the city?

The plaintiff objects as immaterial and not proper cross-examination, the plaintiff having put the witness on to ascertain the value of the premises.

Objection sustained by the court and defendant excepts.

Redirect:

Q. Would it make any difference, Mr. Holzappel, about the exact location of this property, as to its value, as long as it fronted on Broadway and extended west on Grand avenue?

A. No, I don't think it would.

Here the plaintiff rests.

Mr. DOUGLAS: We desire to demur to the evidence.

By the COURT: Dictate your demurrer to the stenographer.

Mr. Douglas dictates the following demurrer: In the district court of the third judicial district, in the Territory of Oklahoma sitting
49 within and for Oklahoma county, Frank McMaster plaintiff *vs.* City of Oklahoma City, defendant. Demurrer. Now comes the said defendant, City of Oklahoma City, and demurs to the evidence introduced herein by the plaintiff and for cause and ground for such demurrer says: That no cause of action has been proved by said plaintiff or by the introduction of said evidence.

Mr. HOWARD: There is one thing more we want to introduce, if the court will allow us to reopen the case for that purpose and it is a mere matter of record in this court.

Mr. HOWARD: We desire if the court please in case No. 278 in this court, the case of Frank McMaster *vs.* Edgar N. Sweet, Levi E. Coe and David H. Hammons townsite trustees to introduce the journal and the order made by the court granting a change of venue in said case. I don't know where to find it.

52 Defendant objects as incompetent, irrelevant and immaterial.

By the COURT: I will admit the journal entry under the same order that the other papers in the case were admitted.

Defendant excepts.

Marked Exhibit "D."

Here plaintiff rests.

Here the defendant interposes the demurrer heretofore dictated.

50 And thereafter on the 17th day of Feb. 1900, said defendant filed demurrer to evidence of plaintiff in said cause, which is in words and figures as follows to wit:

51 TERRITORY OF OKLAHOMA, } *ss*:
Oklahoma County, }

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahomo County.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Demurrer.

Now comes the said defendant, The City of Oklahoma City, and demurs to the evidence introduced herein by the plaintiff, and for cause and ground of said demurrer says that no cause of action has

been proved by said plaintiff or by the introduction of said testimony.

JOHN H. WRIGHT AND
DOUGLAS AND DOUGLAS.
Attorneys for Defendant.

Endorsements: 2053. McMaster *vs.* Oklahoma City. Demurrer to evidence. Filed Feb. 17th, 1900. B. D. Shear, clerk.

52 Here Mr. Howard reads the order for change of venue, found in Journal No. 2, page 407.

The demurrer is by the court overruled and to the ruling the defendant excepts.

Further hearing of this case is now adjourned until February 17th, 1900.

On this February 17, 1900, all the parties to this case being present, the trial continues and proceedings as follows:

C. J. BOWMAN is the first witness called in the behalf of the defendant, and, after being duly sworn, testified as follows:

Q. Your name is C. J. Bowman?
A. Yes.
Q. What office do you hold at present in the county?
A. The office of register of deeds.
Q. Are you in possession of the records of lands and city lots in Oklahoma county?
A. Yes.
Q. Have you with you the book of final receipts, Book 11?
A. Yes.
Q. Turn to page 3; have you there the record of a final receipt of the local land office to the townsite trustees?
53 A. Yes sir.

Mr. DOUGLAS: We offer it in evidence.

There being no objection, the same is admitted and read in evidence.

Marked Exhibit "E."

Q. Have you in your possession there the original townsite plat filed in your office and approved by the board of townsite trustees No. 2?
A. Yes sir.
Q. Is that it?
A. Yes sir.

Mr. DOUGLAS: We offer it in evidence.

Mr. HOWARD: We desire to make objection to the introduction of the plat. 1. It is not a plat of the lands of which it purports to be a plat. 2. It is not certified by anyone in any official capacity, or

undertaking to act as such, particularly the members of the board of townsite trustees. 3. It does not show whether it is a plat adopted by the inhabitants previous to the action of the townsite trustees, or whether it is a plat and survey made by themselves or under their direction. 4. It does not appear to have ever been approved or accepted by the city, village, municipality, or any one for it. 5. It does not appear to have ever been acknowledged or authenticated in the manner required by law to give to the city, or village or municipal government any title to the streets and alleys in the city. 6. The sufficiency and correctness of this plat was especially under consideration before the court in the case of McMasters *vs.* The Townsite Trustees, being the case in which the judgment and pleadings have been introduced in evidence, and
54 it cannot be introduced for the purpose of impeaching that judgment in this hearing. 7. It purports to have been filed before the townsite trustees acquired title to the land described in it. 8. And we offer to prove, as a matter of fact, that instead of being approved by the municipality, it was repudicated and declared fraudulent, and that dissapproval has never been retracted in any manner since, as shown by the records of the city.

The objections are overruled by the court and the plat admitted in evidence.

Marked Exhibit "F"

The plaintiff excepts to the ruling of the court.

Mr. DOUGLAS: I will ask the register if that plat is one of the plats of record in the office of the register of deeds of this county?

A. Yes sir.

Q. And has been in your custody all the time?

A. It has.

Q. From whom did you receive it?

A. From my predecessor, Mr. Owen.

Q. In the register's office?

A. Yes sir.

Q. Mr. Owen was the former register of deeds of this county?

A. Yes.

Cross examination:

Q. Mr. Bowman, are there any other plats of the same land in the office?

A. I think there are, Mr. Howard.

Q. You think there are?

A. Yes sir, one more. This is the amended plat I have. There is another one.

55 Q. I wish you would go down and bring it up, Mr. Bowman.

Mr. DOUGLAS: We will offer in evidence the entries of the county commissioners' proceedings in Book 1, at page 11, 12 and 13.

Mr. HOWARD: We object to its introduction, for the reason that it does not show on the face of it that the number of inhabitants within the boundaries there affixed were such as were authorized to be incorporated in a village at that time, and we now offer to prove, as a matter of fact, that the population instead of being not to exceed 1500, as the law requires, was 8 to 10 thousand, and for the further reason that the petition upon which the order is made is not produced; and it will also show that the board at the time was without authority to make the order.

Mr. DOUGLAS: Swear Richard Caffrey.

Mr. HOWARD: We will agree that he is the county clerk and has a part of the county records and that he is the custodian of them, if that is all you want.

Here counsel reads in evidence the entries heretofore offered marked Exhibit "G."

By the COURT: I will admit this, and if you show it is incompetent, I will strike it out, and give you an exception.

Here the defendant rests.

Rebuttal.

Mr. HOWARD: If the court please, we desire to introduce the minutes of the first meeting of the board of trustees appointed by the resolution of the board of county commissioners, which has just been introduced in evidence.

By the COURT: Let it be marked:

56 (Found on Rec. 1, page 1, of city record, entitled "Organization") marked Exhibit "H."

Mr. HOWARD: We have here a well known standard publication known as Bunkey's First Eight Months of Oklahoma City. We desire to offer the tabulated population of the city, on page 25, and show that prior to that time it had a population of some 6000.

Objected to as incompetent and objection sustained.

SIDNEY CLARKE being called and sworn in rebuttal, testified as follows:

Q. State your name.

A. Sidney Clark.

Q. Mr. Clark, were you a resident or inhabitant of Oklahoma City in July, 1890?

A. I was.

Q. Were you acquainted generally with the condition of affairs and the inhabitants of the northeast quarter of section 4, known as south Oklahoma, and the southeast quarter of section 33, and the south half of the northeast quarter of section 33, known as north Oklahoma, at that time?

A. I had a general knowledge of the situation here.

Q. You may state whether this ground was generally covered with buildings and places of habitation?

Defendant objects as incompetent, irrelevant and immaterial.

Q. I will ask you Mr. Clark whether you are prepared to state approximately what the population of these lands mentioned were during the month of July, 1890.

Defendant objects as incompetent, irrelevant and immaterial; and not the best evidence.

Objection sustained; plaintiff excepts.

57 Q. I will get you to state, Mr. Clark, whether you are prepared to say that on the 15th day of July, 1890, the inhabitants of this city were greatly in excess of 1500.

Defendant objects as incompetent, irrelevant and immaterial; does not tend to prove any fact that is competent to contradict that record; not the best evidence.

By the COURT: I think I will exclude that. If, upon an investigation of the authorities, I conclude that you are entitled to prove it, I will open it up for that purpose.

Plaintiff excepts.

Q. I will ask you Mr. Clark, as a matter of fact, if during the entire month of July, 1890, there was not within the limits mentioned inhabitants that would number at least 6 to 8 thousand, and if that fact was not known to everybody?

Defendant objects as incompetent and not the best evidence.

Sustained by the court and plaintiff excepts.

Mr. HOWARD: We offer in evidence the petition upon which the organization of the village of Oklahoma City was made, as shown by the record that has been offered.

Defendant objects, as there is nothing to show in the petition that it is a petition; it has no filing mark at all; nothing to show that it has ever been recorded; that it does not tend to prove any fact against the defendant and is incompetent, irrelevant and immaterial.

By the COURT: There does not seem to be any date or filing mark or any thing else on it. I expect under that objection it will have to be excluded at this time.

Plaintiff excepts.

58 R. F. CAFFREY being called and sworn, testified as follows in rebuttal:

Q. What is your name?
A. Richard F. Caffrey.
Q. What office, if any, do you hold in this county?
A. County clerk.

Q. As county clerk, do you have custody of the county records?
A. Yes.
Q. Do you recognize this instrument?
A. Yes.
Q. Where did you find it?
A. Among the old files in the office.
Q. You have made special search have you for the petition upon which this order incorporating the village of Oklahoma City is based?
A. Yes, sir.
Q. Is there any other petition down there purporting to be such a petition except that?
A. I will state that I don't know: I thought I had found what I was after when I found this.
Q. You don't know of the existence of anything else?
A. I don't know of anything else.

Mr. HOWARD: We desire to offer this again.
To which the defendant makes the same objection as above.
By the COURT: There are parties in town who will know whether that is the petition.
Mr. DOUGLAS: We will not trouble you to send after witnesses. We will admit that this is the petition upon which the order was based.

Mr. HOWARD: Now I wish to read the court the petition.
59 There were a large number of the petitions but I will read only one of them.
Here Mr. Howard reads the court the petition.
Marked Exhibit "I."
After the reading of which, plaintiff and defendant rest and the testimony is closed and the above and foregoing is all the testimony and evidence introduced by the parties, plaintiff and defendant.

60 "Ex. A."

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

Benjamin Harrison
to
Sweet, Edgar N.; Hammons, David H.; Coe, Levi E.

This instrument filed for record on this 10th day of October, A. D. 1890 and duly recorded in Book 1 page 58 of miscellaneous record.

JOHN M. MARTIN,
County Clerk.

Certificate No. 2.

United States of America to all — whom these presents shall come, Greeting:

Whereas Edgar N. Sweet, Levy C. Coe and David H. Hammons, trustees of the townsite of Oklahoma City in the second county in Oklahoma Territory in trust for the several uses and benefit of the occupants of the townsite of Oklahoma City in said county and Territory according to their respective interests have deposited in the *General Land Office of the United States* a certificate of the register of the land office at Oklahoma City, Oklahoma Territory, whereby it appears that full payment has been made by the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, trustees as aforesaid in trust as aforesaid, according to the provisions of the act of Congress of the 24th of April, 1820 entitled An act making further provision for the sale of public lands" and the acts supplemental thereto including the act of May 14th 1890 for the southeast quarter of section 33 thirty three in township twelve north of range three west of Indian meridian in Oklahoma Territory containing one hundred and sixty acres according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general which said tract has been purchased by the said Edgar N. Sweet, Levy E. Coe and David H. Hammons, trus-
61 tees as aforesaid.

Now know ye that the United States of America in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided have given and granted and by these presents do give and grant unto said Edgar N. Sweet, Levy E. Coe and David H. Hammons, trustees as aforesaid in trust as aforesaid and to their successors. The said tract above described to have and to hold the same together with all the rights, privileges, immunities and appurt-ances of whatsoever nature thereunto belonging unto the said Edgar N. Sweet, Levy E. Coe and David H. Hammons trustees as aforesaid in trust as aforesaid and their successors and assigns in trust as aforesaid.

In testimony whereof I, Benjamin Harrison, President of the United States of America have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the first day of October in the year of our Lord one thousand eight hundred and ninety and the Independence of the United States the one hundred and fifteenth.

By the President,

BENJAMIN HARRISON,
By M. McKEAN, *Secretary.*

[SEAL.]

J. W. TOWNSEND,
Recorder of the General Land Office.

Recorded vol. 9 page 383 to 384.

62 EXHIBIT "B."

In the District Court, 2nd Judicial District, County of Canadian, Territory of Oklahoma.

FRANK MCMASTER
vs.
TOWNSITE TRUSTEES.

FRANK MCMASTER, Plaintiff,
vs.
EDGAR N. SWEET, LEVI E. COE, DAVID H. HAMMONS, Defendants.

This case coming on to be heard before the Hon. J. H. Burford, judge of said court on the pleadings and evidence herein, the court finds that the defendants were trustees of the townsite of Oklahoma City in said county for the benefit of the actual occupants thereof under the act of Congress approved May 14th, 1890.

That on the 3rd of September 1890 said trustees entered at the land office of the United States at Oklahoma City, O. T., the S. E. ¼ sec. 33 twp. 12 N. range 3 west of the Indian meridian in trust for the use and benefit of the occupants thereof and that a patent has been issued to said trustees for said land to be conveyed by them to the occupants thereof as their several interests should appear at the date of said entry.

That said tract of land was on the 22nd day of April, 1889 open to settlement under the act of Congress approved March 2nd 1889 and that such tract of land was settled upon and occupied as a townsite shortly after noon of said day and has continued to be and is now held and occupied.

That a portion of the occupants of said tract on said 22nd day of April 1889 agreed tacitly to the plat of said tract of land, conveying lots, blocks, streets and alleys and that the plaintiff herein on said day legally entered upon and occupied and has since continued to claim the piece or parcel of ground particularly described in the complaint as his lots.

63 That said piece or parcel of ground at that time was lots 1 and 2 in block 24 according to the plat so agreed upon.

That the Exhibit A attached to the complaint is a correct copy of said plat.

That subsequently to such occupancy and prior to the conveyance to said trustees a different plat and arrangement of the streets, blocks, lots and alleys was adopted and enforced by the parties occupying the said townsite.

That by such plat the parcel of land claimed by the plaintiff was thrown into the street called Grand avenue. The plaintiff did not consent but objected to said second plat and has never consented thereto or acquiesced.

That said tract of land is described as follows, according to the said last named plat, commencing at a point on the S. E. corner of block 23 according to the present plat and running southerly on a line with the west line of Broadway, thirty-three and 10/1000 feet from said south east corner of said block 23, thence west from said west line of Broadway 140 feet, thence south 50 feet, thence east 140 feet and thence north 50 feet to the place of beginning.

That thereafter he was by parties recognized, by said authorities forcible removed from said parcel of ground and has since that time been forcibly kept from the occupancy of said tract.

That on the 21st day of April, 1891 this plaintiff applied to said defendants as such trustees for deed to said lot but said trustees found the fact substantially as above stated but declined to award him a deed for said lot or any part thereof.

64 That said city of Oklahoma City has appropriated said lots to his own purpose as a street and so appropriated the same long prior to the conveyance of said tract by the United States to said trustees.

That C. G. Jones, A. C. Scott and Moses Neal are the suc-essors in said trust of said defendants.

That said plaintiff was not an occupant of said tract of ground at the time the United States conveyed the same to the defendants as trustees but said portion of said tract was at the time used and occupied as street by said city.

JNO. H. BURFORD, *Judge.*

TERRITORY OF OKLAHOMA, } ss:
Canadian County, }

I, Benj. F. Hegler, clerk district court in and for the county and Territory aforesaid do hereby certify that the above and foregoing is a full and correct copy of an order and decree of the court in the above-entitled case as the sam eappears of record on Order Book 1, page 427, in my office.

Witness my hand and the seal of said court hereto affixed at my office in El Reno this 11th day of May 1892.

BENJ. F. HEGLER,
Clerk District Court,
By E. R. FISCHER, *Deputy.*

TERRITORY OF OKLAHOMA, }
County of Oklahoma. }

This instrument filed for record on this 14th day of May 1892 at 1:30 o'clock p. m.

R. H. MANSUR,
Register of Deeds.

65 EXHIBIT "C."

In the District Court, Canadian County, Second Judicial District, Oklahoma Territory.

FRANK McMASTER
vs.
EDGAR N. SWEET, LEVI E. COE, and DAVID H. HAMMONS, TOWNSITE Trustees, Board No. 2, and Their Successors.

On motion in this case, on the 13th day of October 1893 being one of the regular days of said court at Kingfisher in Kingfisher county in open court, the same being then in session the following proceedings were had:

It is ordered herein that said defendants make, execute and deliver to Frank McMaster, plaintiff herein, a trustees' deed as decreed by this court on the 14th day of November 1892 of the following described premises and real estate to-wit: Commencing at a point on the southeast corner of block (23) twenty-three as shown by the trustees' plat of Oklahoma City O. T. running thence southerly on a straight line with the west line of Broadway as shown by said trustees' plat thirty-three and ten one-hundredths (33.10/100) from said southeast corner of the block aforesaid to the place of beginning, thence west one hundred and forty feet (140) thence south at right angles with the line aforesaid fifty (50) feet, thence east parallel with the aforesaid east and west street line one hundred and forty (140) feet thence north to the place of beginning fifty (50) feet. Provided however that the said plaintiff, shall fully — all costs of said trustees in the making of the deed herein ordered.

66 In witness whereof I have hereunto set my hand and caused the seal of said court to be affixed this 13th day of October, 1893.

JOHN H. BURFORD, *Judge.*

TERRITORY OF OKLAHOMA, } ss:
County of Kingfisher, }

I Benj. F. Hegler, clerk of the district court of the 2nd judicial district *and* in and for said county and Territory, hereby certify that the within and foregoing is a full, true and complete copy of the order this day made in the above entitled cases as the same appears on file and of record in my office.

In witness whereof I hereto set my hand and the seal of said county at Kingfisher this 13 October, 1893.

[SEAL.]

BENJ. F. HEGLER,
Clerk of 2nd Dist., O. T.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

67 EXHIBIT "D."

FRANK McMASTER
vs.
EDGAR N. SWEET ET AL., Trustees. } 278.

Now comes the plaintiff by O. H. Violet, his attorney, and files in open court a motion for change of venue of this cause, and the affidavit having been properly filed as required by the statutes and the court having duly considered said motion and affidavit *and* grants a change of venue to Canadian county, O. T., and the clerk is hereby ordered to forward all the papers on file in this case to the clerk of the district court of said county upon plaintiff's paying all the costs herein accrued.

68 EXHIBIT "E."

No. 2, cash entry, land office at Oklahoma City, sec. 33, town. 12, range 3.

LAND OFFICE AT OKLAHOMA CITY, O. T., *Sept. 3rd*, 1890.

It is hereby certified that in pursuance of law Edgar N. Sweet, Levi E. Coe and David H. Hammons comprising board No. 2 townsite trustees for Oklahoma City in the Territory of Oklahoma on this day purchased of the register of this office for the use and benefit of the inhabitants thereof according to their respective interests the south east quarter (¼) of section 33, township No. 12 north of range 3, west of the Indian meridian, containing 160 acres at the rate of one dollar and 25 cents per acre amounting to two hundred dollars and for which said townsite trustees have made payment in full as required by law. Now therefore be it known that on presentation of this certificate to the Commissioner of the General Land Office the said trustees shall be entitled to receive a patent for the lot above described.

JOHN H. BURFORD, *Register*.

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

This instrument filed for record on the 13th day of Sept. A. D. 1890, and recorded in Book 11, page 3 of final receipts.

(EXHIBIT "F"—MAP.)

(Here follows blue print marked page 68a.)

69 EXHIBIT "G."

JULY 15TH, 1890—9 o'clock a. m.

Board of county commissioners met pursuant to adjournment. All members of the board present.

Written notice signed by A. B. Hammer, county judge, was brought to the board by deputy sheriff, stating that the petition praying for the enjoining of the board of county commissioners from incorporating the N. E. ¼ sec. 4—tp. 11—R. 3 west, in the village of Oklahoma City, had been withdrawn by plaintiff, George E. Thornton and the temporary restraining order, before granted, dissolved by said court.

The matter of incorporating the village of Oklahoma City was then taken up, it being certified in the petition praying for such incorporation that the signatures therein, represented a majority of the taxable inhabitants contained within the limits prayed for; and being satisfied that citizens to the number of 200 or more resided within said limits of each proposed village of Oklahoma City, on motion made, seconded and carried the prayer of said petition was granted and the incorporation of the village of Oklahoma City was ordered within the limits prayed for, and the following trustees appointed residing within said limits, to-wit: D. M. Gibbs, S. Frist, Nelson Button, H. Overholser, F. J. Watson to serve and act as such until their successors should be elected and qualified as set forth in following

Order of Incorporation of the Village of Oklahoma City.

TERRITORY OF OKLAHOMA, } *ss:*
Second County, }

COUNTY CLERK'S OFFICE FOR SAID COUNTY, *July 15th*, 1890.

Now on this day the board of county commissioners within and for said county of Second and Territory of Oklahoma met
70 pursuant to adjournment.

Present: W. F. Higgins, Franklin Springer, J. A. Hartzell, county commissioners and John M. Martin, county clerk within and for said county.

And thereupon came J. H. Woods who appears for the taxable inhabitants of the towns of Oklahoma City, in said Second county in the Territory of Oklahoma, whose signature appears upon the petition hereinafter named and for said taxable inhabitants presented to said board of county commissioners the petition of G. D. Munger, S. K. Hawkins and five hundred and more others, which petitions are hereto annexed who are taxable inhabitants and residents of the

town of Oklahoma City, praying that the south half of the north east quarter of section No. (33) thirty three in township (12) twelve, north range three (3) west, and the south east quarter of section thirty three (33) of township twelve (12) north range three (3) west, and the north east quarter of section four (4) township eleven (11) north range three (3) west of the Indian meridian, all in Second county and Territory, of Oklahoma, and thereupon the said board of county commissioners proceeded to hear and determine said petition and the said board having examined the said petition and the signatures thereto and the affidavits attached to said petition and having sworn and examined various witnesses who were taxable inhabitants and residents of the said town of Oklahoma City and having heard the arguments of counsel and being fully advised in the premises do find and determine that the averments of said petition and each and all of them are true and that a majority of the taxable inhabitants of the proposed village have signed said petition, and that inhabitants to the number two hundred and more are actual residents of the territory in said petition described, and the
71 said board of county commissioners being satisfied that a majority of the taxable inhabitants of the proposed village of Oklahoma City have signed said petition so as aforesaid presented to said board and that inhabitants to the number two hundred and more are actual residents of the territory described in said petition, it is therefore by the said county board now ordered and declared that the said proposed village of Oklahoma City and it thereby is incorporated as prayed for in said petition, and that the metes and bounds be and they hereby are designated as follows: Commencing at the north east of the south half of the north east quarter of sec. thirty three (33) of township twelve (12) range three (3) west of Indian meridian in Second county of the Territory of Oklahoma and running thence south to the south east corner of the *the* north east quarter of section four (4) of township eleven (11) north range three (3) west of Indian meridian, Territory of Oklahoma, thence west to the south west corner of the north east quarter of said section four (4), thence north to the north west corner of the south half ($\frac{1}{2}$) of the north east quarter of section thirty three (33) of township twelve (12) as aforesaid, thence east to the place of beginning containing four hundred (400) acres of land more or less according to Government survey and which said land is more particularly described as follows: the south half ($\frac{1}{2}$) of the north east quarter and the south east quarter ($\frac{1}{4}$) of sec. thirty three township twelve (12) north range three (3) west and the north east quarter of section four (4) township eleven (11) north range three west of Indian meridian all in Second county Oklahoma Territory; and it is by the board of county commissioners of said county further ordered and declared that the corporate name of said village shall be the village of Oklahoma City and the same is
72 hereby declared an incorporated village under the said name and style of the village of Oklahoma City and it is hereby

further ordered and declared that from and after this date the inhabitants residing upon said lands herein described shall be a body politic and corporate by the name and style of village of Oklahoma City, and they and their suc-essors shall be known in law and have perpetual suc-ession, sue and be sued, defend and be defended in all courts of law and equity; contract or be contracted with, acquire, hold and convey property real and personal; have a common seal which they may change and alter at pleasure; and such other and further powers as may be conferred by law and further may do any and all acts that *is* lawful for incorporated villages to do, under and by virtue of the law of this territory in relation to incorporated villages. And it is further ordered by said board of county commissioners that D. W. Gibbs, S. Frist, Nelson Button, H. Overholser, F. J. Watson be and they hereby are appointed trustees in and for said village of Oklahoma City, who shall hold their offices and perform all the duties required of them by law until the election and vualification of their suc-essors in the manner provided by law.

Witness our signatures and seal of the county hereto subscribed this 15th day of July, A. D. 1890.

[COUNTY SEAL.]

JOHN M. MARTIN, *Clerk.*
FRANKLIN SPRINGER.
J. A. HARTZELL.

73 EXHIBIT "H."

Organization.

On this the 22nd day of July, 1890, met at the court house in the Second county of Oklahoma Territory, D. W. Gibbs, T. J. Watson, N. Button, Sam Frist, H. Overholser, the duly appointed trustees for the village of Oklahoma City, who were sworn in by J. M. Martin, clerk of said county, proceeded to organize by electing D. W. Gibbs president of said board, on motion of T. J. Watson, T. M. Upshaw was elected clerk, who after being sworn in as such proceeded to the performance of said duties.

Motion made and carried that the attorney, H. H. Howard be requested to meet with the board and advise as to further proceeding.

The following resolution was offered by H. Overholser, and the yeas and noes being called was adopted unanimously.

Resolved. That we now proceed to call an election, for officers of a city of the second class, and to organize such city.

The board then adjourned until 1 o'clock p. m.

The board met at 1 o'clock as per adjournment with President D. W. Gibbs, presiding and all members of the board present.

On motion of N. Button, the rules were suspended by a unanimous vote of the board, and the following ordinance dividing the city into four wards was read three times and the yeas and noes being called, the same was adopted unanimously.

74 EXHIBIT "I."

TERRITORY OF OKLAHOMA, } ss:
Second County, }

Before the board of county commissioners within and for said county and Territory.

To the honorable board of county commissioners of the Second county, Territory of Oklahoma:

We the undersigned taxable inhabitants of the town of Oklahoma City, situated in the said Second county of said Territory, do hereby petition and pray you that we may be incorporated as a village under and by the name of Oklahoma City, and that the metes and bounds of the proposed village be as follows; to-wit: Commencing at the north east corner of section thirty-three (33) township twelve (12) north, range three (3) west of Indian meridian, Territory of Oklahoma and running thence to the southeast corner of northeast quarter of section four (4) township eleven (11) north range three (3) west of Indian meridian, Territory of Oklahoma, thence west to the southwest corner of northwest quarter of said section four (4), thence north to northwest corner of the southwest quarter of said section thirty-three (33), thence east to northwest corner of said southwest quarter of said section thirty-three, thence north to northwest corner of northeast quarter of said section thirty-three (33), thence east to the place of beginning, containing eight hundred (800) acres of land more or less, according to U. S. Gov't survey.

We further represent and show to you that we are all taxable inhabitants of the said town of Oklahoma City, and that we are each and all inhabitants *of the said town of Oklahoma City, and that we are each and all inhabitants* and actual residents of the said town and reside within the metes and bounds above described and that
75 there are in said town of Oklahoma City inhabitants to the number of two hundred (200) and more who are actual residents of the Territory above described in this petition. We further represent and show to you that the said town of Oklahoma City has not heretofore been incorporated under any law of the said Territory of Oklahoma.

Names.

L. H. Graham, T. B. Roberts, S. E. McConnell, T. McConnell, E. W. Burns, Geo. F. Graham, John Wilkerson, Thos. P. Gorman, Geo. O. Gorman, W. B. Bain, W. D. Gault, W. R. Jacobs, W. S. Aikins, A. G. Wall, Frank Dupers, Ed Ferguson, B. G. Avery, J. G. Spene, John Hrabe, E. F. Hutchinson, Wm. Hulycha, O. E. Cody, J. Kaufman, T. J. Newel, S. R. Newel, J. F. Martin, S. G. Sperry, D. C. Ellison, J. A.

Swope, S. N. Logan, J. B. Lewis, M. W. Hanley, A. L. Frick, W. C. Carrington, S. A. Steward, H. S. Butler, John McNeish, H. H. Mullins, Wm. Smith, C. L. Arnold, W. B. Berry, Rodulph Swartz, J. W. Stanfield, Geo. Ross, G. T. Wright, Peter Gibbins, Jas. M. Brogan, John Hood, E. J. Beale, J. Burton, O. G. Lee, W. A. Thompson, T. R. Hurd, Louis Scheider, John Muranzky, J. R. Scoot, D. P. Writne, L. L. Land, E. L. Blackwood, I. N. Phillips, J. D. Troop, H. M. Py; es, Ben Crayfroft, Geo. T. Young, C. E. Baker, D. H. Torbett, D. H. Phillips, J. W. Abernathy, E. J. Kellar, G. Washington Pence, A. H. Niles, W. M. Adams, R. W. McAdams, Richmond H. Swaile, H. E. Foster, C. Bush, G. R. Brokeck, T. M. Upshaw, R. S. Fisher, B. B. Ros, Victor Sherman, Albert Rey, A. L. Battles, W. S. Marshall, J. C. Whaley, H. F. Butler, H. F. Betts, Joe Smith, I. M. Brown, B. F. Card, Lutte F. Pyles, A. A. Whitson, J. O. Casler, J. J. Lowe, J. C. Hickey, C. S. Cooper, M. S. Miller, T. W. Williamson, Lewis Brown, C. B. Haley, John Fowler, Carter Townley, Frank Bowden, H. H. Haley, J. B. Rolater, A. Meyer, Fred H. Bonner, W. A. Monroe, D. P. Gunter, J. A. Haning, C. Hast, C. F. Renlor, J. W. Brusha, E. F. Field, 76 F. Harrah, W. Church, F. Starzinger, J. I. Chase, W. B. Adamson, Davidson Case, F. M. Blankenship, J. B. Otto, J. P. Benson, A. Short, E. E. Kiwkie, F. C. Rice, J. C. Romick, F. O. Miller, Charles Redenbauch, W. P. Blackburn, C. A. Tomlin, Geo. R. King, W. R. Orne, M. C. Brown, J. E. Bell, R. L. Overstreet, C. H. Peters, John Hubatka, John Ruzichey, Joseph Sventa, F. V. Brandom, J. S. Lindsley, G. M. Houston, C. S. Vanderburg, Kellar Warren, J. S. Eads, J. S. Davis, Geo. Coen, C. E. Wage, Ed Chaney, G. M. Barr, W. I. Hines, G. F. Dean, T. N. Haynes, C. D. Harvey, A. Calhoun, J. P. Hickey, J. G. Ware, S. E. Bartell, Will Rickets, John C. Smith, G. C. McCutchen, J. A. Ryan, C. Fisher, A. B. Hammer, H. A. Hammer, J. E. Bundy, H. H. Black, Melvin Barber, J. W. Haley, L. Morris, F. P. Ross, H. B. Jones, J. C. McCarney, J. T. Brown, H. De Land, J. E. Chism, A. T. Brown, M. P. Brown, A. L. Price, J. C. Williams, J. F. Swejkoosky, Marion Cross, A. C. Anderson, F. H. Morgan, I. M. Huntsman, H. F. Crod, Heinallomt, Phillip Monroe, David Wolfe, John Schwrappather, R. Y. Chander, H. T. Betts, W. H. Burdick, W. A. Watkins, J. E. Basset, J. Bunyan, Garrison, D. S. Graham, Jas. Whittaker, F. J. Bradford, James Dowen, A. H. Rimes, Charley Vest, J. Y. Benton, C. L. Rhodes, P. Rhodes, Jim Reynolds, O. A. Mitscher, H. W. Clergern, C. W. Meyers, Sam Murphey, Frank Inglis, Charlie Rowley, Henry Rowley, R. C. Grubbs, J. D. Brown, H. B. Mitchell, B. F. Allen, D. M. Card, J. R. Green, J. L. Brown, James H. Wallace, Geo. G. Hunt, Wm. Hankins, R. D. Brownell, Jim Rae, Sam Jenkins, G. W. Jenkins, D. D. Leach, Wm. H. Monroe, Emil Bracht, John Eliason, John W. Bryant, Ray S. Reagon, J. O. Carlton, W. S. Bolar, Guy Cot, G. B. Fey, Chas. Gall, Geison Bows, L. W. Beusf, F. S. Dewey, J. B. Coonse, C. B. Boyle, B. J. Miller, John McKee, E. W. Burns, V. Balzer, E. Balzer, Gus Klein, Wm. McCoy, L. W. King, A. Dunham, Fred Comstock, Arthur Hyde, Frank Hall, H. Will, Edward Lowe, Henry Story,

N. N. Miller, N. D. McCarn, J. A. Bailey, N. N. Meller, Christian Cramer, F. E. Scott, G. A. Mitchell, W. H. Baker, C. E.
77 Ettinger, J. G. Tannor, Geo. Kezer, W. Keunkle, C. E. Benian, A. Pettyjohn, J. W. Rheudy, J. D. Winkle, W. V. Wallace, Wm. Roe, R. Poplin, Max H. Wagner, J. J. Wetzel, Robert J. Ray, R. R. Connella, Sam Murphy, S. R. Thornberger, Phil Jones, W. J. Wolds, J. Vance Lewis, Oscar Anderson, H. T. Betts, J. W. Gorman, D. W. Roberts, Robert Kelley, George Kells, Tom Kelly, R. J. Coons, John Wand, Ed. Grayson, T. C. Williams, Herman Turk, Sig Warner, Samuel Warner, Jas. Reughon, Geo. Selby, J. H. Barry, Rudolph Schwartz, Jas. Clemmen, B. F. Meek, A. McMaster, C. Bright, W. C. Thompson, J. W. Fennen, Joseph Young, John Hrashey, George F. Graham, C. F. Gilpin, W. D. Gault, C. R. Chitwood, J. T. Hill, J. D. Dyer, Jas. McCrahanan, Jerry Williams, W. P. Williams, W. Markwell, C. A. Jones, Ira Vandozer, J. W. Foster, Thos. Blaise, F. Belknak, V. S. A. W. Dunham, agent A. T. S. F. M. J. Williams, G. R. Brobeck, John Erichson, T. B. Roberts, G. W. White, J. W. Davis, jeweler, E. P. Davis, W. W. Asher, J. C. Bigelow, H. J. Cappenger, G. H. Newey, Lon Kinton, R. H. Williams, Geo. G. Garrison, Walter Penney, J. M. Hart, A. B. Woodruff, Andrew Wells, G. W. Parker, Sam McPherson, Chas. H. Pack, B. H. Kelley, R. A. Moore, Wm. T. Miller, N. L. Turner, W. S. Defenbaugh, W. C. Schultz, I. M. Forrest, Chas. Balzer, E. E. Henderson, C. H. Beam, Jacob Morris, J. C. Hall, J. D. Bryant, J. N. Lund, W. H. Stamper, A. A. Smith, S. Hendrey, J. M. Nanson, E. B. Pugh, H. H. Hillman, C. W. Routh, B. R. Harrington, Walter Briggs, S. A. Brownwell, N. O. Kelly, J. H. Stophs, W. G. McGee, S. C. Cooke, H. B. Ca-ey, T. C. Hughes, J. V. Gordy, N. I. Niswanger, Dowden & McGlinchey, E. W. Dowden, H. P. Bundy, J. C. Laird, W. C. Arnold. H. C. Way, I. M. Folson, H. C. Aikins, C. J. Babcock, W. A. Grason, O. Weidwenhalt, S. J. Milligan, O. F. Johnson, A. Hamilton, B. C. Fitzgerald, Wm. Clegne, J. A. Ruhl, J. T. Wyatte, J. H. Wyatte, J. T. Farrell, J. G. Benney, Wallace and Limbocker, Ben. De Gee, Geo. W. Fahs, J. R. Harvey, E. C. Hamill, J. D. Arnold, F. P. Whitesides,
78 S. D. Johnson, P. S. Stribling, E. T. Word, A. Morrison, G. J. Laurence, S B. Dyer, J. A. Haning, M. G. Murall, A. L. Winn, A. B. Hammer, J. M. Hobson, H. J. Knopp, Andrew Wardment, Eugene Wallace, J. H. Wheeler, R. D. Davis, John Wallace, Robert Kincaid, E. Elteman, Wm. McMullin, J. P. Boyle, Geo. Farrah, H. W. Sawyer, John Gallegher, G. R. King, A. Haley, Fred Neal, Chas. R. Rivian, William Wills, I. Lewenstein, T. D. Smith, N. Winnenpaugh, Thos. B. Winningham, Chas. E. Mach, J. B. Banks, E. Overholser, Jas. Frasier, Ben Massey, Dan T. Murray, S. E. McConnell, C. S. Yates, J. O'Rouke, Maurice Rider, F. C. Seiger, Thos. V. Gorman, Geo. O. Gorman, J. M. Cunningham, Wm. Alexander, W. R. Jackson, J. B. Kingham, G. W. R. Chinn, C. G. Jones, David Carson, Y. V. Featherby, Frank Brown, S. B. Owlender, J. J. Spencer, J. E. Harwell, John Christianson, F. M. Maxey, H. Lancester, C. D. Hakes,

William Vance, Swan Johnson, Jesse Markland, I. M. Huntsman, P. V. Hillman, H. T. Croil, S. E. Stule, Henry Tylor, I. B. Hrabe, Frank R. Hrabee, Joseph Coing, J. D. Buntley, Frank Kozats, Perry C. Glines, Henry A. Smith, Chas. A. Gitz, Oliver Shaw, W. D. Avery, John Scwoppacher, Joseph Scott, R. Y. Chandler, A. W. Whitson, W. H. Burdick, Wm. Becker, F. H. Morgan, A. C. Anderson, W. H. Winebrenner, Albert Hauskins, G. W. Chin, Jr., D. W. Olin, T. J. Watson, N. Z. Hurd, J. E. Y. Owens, S. N. Logan, J. A. Swope, W. P. Searks, S. E. Davis, Ben Dierke, Jerry Williams, D. E. Strong, James C. Mann, F. A. Wiese, W. W. Mitchell, C. A. Winslow, W. Markwell, Ed Markwell, Jr., F. Ballion, John Frees, Chas. McGoughey, E. L. McCawes, T. W. Cunningham, W. D. Parker, Robert Evans, Joseph Linton, A. L. Cortz, W. H. Bean, A. H. Ninard, John Wells, S. P. Perkins, E. T. Freeman, Joseph Cook, R. W. Wells, J. H. Gaines, Ocie Garver, Mat Jones, Hugh Kelley, Frank Novak, H. L. Wells, George Harn, F. S. Hamilton, Thos. Johnson, W. H. Comby, John Bruckhart, W. A. Watkins, Frank G. Wall-ce, R. Ruffin, Thos. Lewis, J. H. Wilson, J. M. Nebolt, H. E. Diele, M. E. Eastus, F. A. Hazen, H. H. Niles, E. W. Nepes, A. E. Hazel, A. J. Hane, H. Nicholls, George A. Gray,
79 H. N. Dunlap, D. H. Martindale, J. H. Vance, Henry Davis, S. Goodwin, W. E. Honeygrove, W. M. Johnson, H. R. Stovall, W. A. Wade, W. T. Gilley, J. B. Wheeler, J. Wallace, L. E. Esten, P. G. Burns, J. W. Nicely, A. E. Macy, Henry P. Grum, W. S. Field, H. Overholser, H. C. Boykins, John Ragon, William Ruse, J. N. Reynolds, J. W. Tindall, John Bontley, N. B. Taylor, Frank Woolf, Maria Bontley, Julius Bontley, A. H. Hubuckas, John Hrabe, Anton Breitz, Albert Buesck, Mary Hrabe, F. K. Vandrews, Kicalayicks, Frank Hrabe, J. B. Hrabe, Frank Shorne, A. L. Kose, Frank Kozak, Frank Berry, J. W. Adams, Charles Shoney, G. H. Biles, S. S. Biles, T. J. Starr, O. C. Gowan, B. F. Mecks, J. J. Queenan, S. D. Queenan, Geo. H. Remington, Geo. Misner, W. B. Alexander, John I. White, Isaac Williams, C. F. Smith, Jerry Williams, I. D. Dyer, Rick Henderson, J. C. Bigelow, Lewis Donweather, H. C. Scott, Willie Goodson, Chas. Hathway, J. H. Cunningham, John Stsothatte, Jno. Kington, Chas. Birds, A. B. Beard, W. H. Deffenbaugh, Harmon Turk, W. J. Woods, S. E. Warst, Frank Pickrel, C. H. Eagin, Chas. E. Eagin, Chas. E. Harwood, C. Lenord, S. C. F. Norman, J. O. Gurbbs, S. Hendrey, W. W. Boyd, W. H. Stamber, A. A. Smith, S. M. Nanson, B. C. Minor, J. M. McClung, A. J. Brown, H. H. Smith, W. F. Busch, W. H. Horn, O. J. Hill, J. T. Hill, Chas. Irenfield, William Smith, C. M. Terrill, R. Fulkerson, M. I. Brown, Jno. Ayers, W. P. Kendall, S. B. Dyer, R. Brown, C. W. Cunningham, W. C. C. Isaacs, J. G. Patson, W. R. Brusha, J. P. Freeman, Jas. M. Granahan, C. G. Richach, James R. Ellise, M. Barker, J. B. Hitchcock, J. T. Seaton, J. T. Ellard, J. Ellard.

80 TERRITORY OF OKLAHOMA, } ss:
Second County, }

J. M. McClung being first duly sworn on oath says that he carried the above and foregoing petition for the incorporation of the town of Oklahoma as a village, and procured the signatures thereto. That he is acquainted with the persons whose names are signed to said petition and that he knows that said signatures are genuine signatures of the persons who signed their names thereto, and that all the persons whose names appear on said petition and who signed the same are taxable inhabitants of the said town of Oklahoma City and that they each and all are inhabitants of and reside within the Territory described in the above and foregoing petition.

J. M. McCLUNG.

Subscribed and sworn to before me this first day of July, 1890.

ROBERT A. DAVIS,
Notary Public.

81 TERRITORY OF OKLAHOMA, } ss:
Second County, }

H. A. Hammer being first duly sworn on his oath says: I am one of the enumerators appointed by Governor G. W. Steele to take a census of the city of Oklahoma, Oklahoma Territory, and that I have examined the names signed to the foregoing petitions and do swear that the persons who have signed the same are a majority of and more of the taxable inhabitants residing on the area described in said petitions.

(Signed) H. A. HAMMER.

Subscribed and sworn to before me this first day of July, 1890.

WILL H. CLARK, *Clerk,*
By H. P. GREEN, *Deputy.*

82 And thereafter on the 7th day of July, 1900, the following proceedings were had in said cause, to-wit:

83 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant.

Case No. 2053. Journal Entry of Judgment.

Be it remembered that this cause came regularly on to be heard upon the petition of the plaintiff, the answer of the defendant and

reply of the plaintiff, and the plaintiff being present in person and by his attorneys, H. H. Howard and F. J. Kearful, and the defendant being present by its attorneys, John H. Wright and Douglas and Douglas, trial by jury was waived by both parties and the case proceeded to trial before the court without a jury; and the court having heard the evidence of both parties in support of the issues on both sides and having heard the arguments of counsel and being fully advised in the premises, on the 7th day of July, 1900, it is by the court found, ordered, adjudged and decreed: That the plaintiff is the legal and equitable owner and entitled to the possession of the following described real estate and premises situated in Oklahoma county, Territory of Oklahoma and being a part of the south-east ¼ of section 33, township 12 north of range 3 west of the Indian meridian: Commencing at a point in said Oklahoma City at the southeast corner of block 23 thereof, as shown by the trustees' plat of said city now in use as the plat of said city, and on file in the office of the register of deeds of said county, and running thence southerly on a straight line with the west line of Broadway street, as shown by said plat, thirty-three and ten one hun-
84 dredths (33.10) feet from the southeast corner of the block aforesaid to the place of beginning, thence west from said place of beginning 140 feet, thence south at a right angle with the line aforesaid 50 feet, thence east parallel with said east and west line first named 140 feet, thence north parallel with said north and south line 50 feet to the place of beginning; that the defendant, since November 14th, 1892, has unlawfully kept the plaintiff out of possession and now unlawfully keeps the plaintiff out of possession of said described property; that the value of the use of said property since November 14th, 1892, is $250.00 per year; that the plaintiff do have and recover of and from the defendant the possession of said described real estate, together with damages for the wrongful detention thereof in the sum of $250.00 per year for the period of three years next prior to the date of the commencement of this action up to date of the execution of this judgment, and that the plaintiff have judgment against the defendant for the costs of this action taxed at — to which order and judgment of the court, and to each and every part thereof the defendant then and there excepted and excepts; and thereupon the defendant, by notice on the journal of said court, demanded a second trial of said action as provided by statute in ejectment, which said demand is granted and this order and judgment is by the court set aside and vacated and a second trial of said action is by the court ordered and allowed, and said cause is continued to the next term of the said court.

B. F. BURWELL, *Judge.*

The above is satisfactory.

SELWYN DOUGLAS.

2053. Frank McMaster, plaintiff, *vs.* the City of Oklahoma
85 City, defendant. Journal entry of judgment. Filed in district court of Oklahoma county, O. T., August 16, 1900. B. D. Shear, clerk. By M. McKinley, deputy.

And thereafter on the 21st day of Jan. 1901, plaintiff filed the following motion in said cause to-wit:

86 OKLAHOMA TERRITORY, }
Oklahoma County. }

In the District Court.

FRANK MCMASTER, Plaintiff, }
vs. } No. 2053. Motion to Set Aside, etc.
OKLAHOMA CITY, Defendant. }

Now comes Frank McMaster, plaintiff herein and moves the court to set aside and hold for naught any order stay or proceeding made herein upon a notice for a new trial, as a matter of right, and without other cause or showing, herein by the defendant. For this that; Said notice and all proceedings thereunder or founded thereon are wholly void without right or authority of the statutes of Oklahoma Territory.

Wherefore plaintiff asks that any orders or proceedings taken by reason of said notice be set aside and held for naught and that plaintiff have execution herein under the judgment herein heretofore entered in his favor at the trial aforesaid.

FRANK McMASTER,
Pl'ff's Att'y.

No. 2053, McMaster *vs.* Oklahoma City. Motion to set aside. Filed in district court, Oklahoma county, O. T. Jan. 21, 1901. B. D. Shear, clerk. By M. M. McKinley, deputy.

87 I hereby certify, that the typewritten instrument hereto attached is a true and correct copy of section 618 and 619, article 24, chapter 66, of the General Statutes of 1893; that I have compared said sections 618 and 619, as published in General Statutes of 1893, with the enrolled bill on file in this office, entitled "An act to provide a civil code of proceedure for the Territory of Oklahoma," which bill was passed by the second Legislative Assembly of Oklahoma Territory and signed and approved by the governor of said Territory on the 16th day of March, A. D., 1893, and find the same to be a correct copy of the corresponding sections of said bill.

I further certify, that said sections have not been repealed nor amended and are existing statutes of Oklahoma Territory. That said enrolled bill bears the following endorsement:

"Approved March 16, 1893. A. J. Seay, governor."

Witness my hand and the great seal of the Territory of Oklahoma at Guthrie, Oklahoma Territory, this fifth day of October, A. D. 1900.

[SEAL.]

WM. M. JENKINS,
Secretary Oklahoma Territory.

SEC. 618. In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial, by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.

SEC. 619. No further trial can be had in such action, unless, for good cause shown, a new trial be granted, or the judgment be reversed, as in other actions.

88 And thereafter on the 11th day of Feb. 1901, the plaintiff filed the following motion in said cause, to-wit:

89 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Case No. 2053.

Motion to Vacate Order Granting Second Trial.

Comes now the plaintiff and moves the court to make and enter an order setting aside and vacating the order heretofore made granting to the defendant a second trial of the above entitled cause as a matter of right upon its simple demand therefor by notice on the journal, and without cause, for the reason that the court had no power or jurisdiction to make said order granting said second trial as a matter of right without cause, said power having been exercised under section 4496, Oklahoma statutes, 1893, which statute is wholly void as being in direct contravention of that portion of the seventh amendment to the Constitution of the United States which declares:

"In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

FRANK MCMASTER, *Plaintiff.*
F. J. KEARFUL,
Att'y for Plaintiff.

2053. Frank McMaster *vs.* City of Oklahoma City. Motion to vacate order granting second trial. Filed in district court, Oklahoma Co., O. T. Feb. 11, 1901. B. D. Shear, clerk. By M. McKinley, deputy.

90 And thereafter on the 29th day of April, 1901, the following proceedings were had in said cause, to-wit:

91 FRANK McMASTER *vs.* OKLAHOMA CITY. } Case No. 2053,

Now on this 29th day of April, 1901, this cause came on to be heard by the court on motion of plaintiff to re-instate judgment in said cause rendered on the 7th day of July, 1900, and on consideration thereof, the court sustained said motion, to which the defendant then and there excepted, and still excepts, and afterwards and on said day in open court the defendant filed motion for new trial. And it is ordered that judgment be and is hereby stayed until further order of the court or judge.

92 And that said motion of defendant for new trial last referred to is in words and figures as follows, to-wit:

93 TERRITORY OF OKLAHOMA, *County of Oklahoma,* } *ss:*

In the District Court.

FRANK McMASTER, Plaintiff, *vs.* THE CITY OF OKLAHOMA CITY, Defendant. } Motion for New Trial.

Now comes the said defendant, The City of Oklahoma City, and moves the court to set aside and vacate the judgment heretofore rendered and set aside by the court in said action on the 7th day of July, 1900, and again, upon motion of plaintiff, reinstated by the court on the 29th day of April, 1901, and to grant said defendant a new trial of said action, for the following causes which affect materially this defendant's substantial rights, to-wit:

1. Irregularity in the proceedings of the court by which the said defendant was prevented from having a fair trial.

2. Certain orders made by the court by which the said defendant was prevented from having a fair trial.

3. Abuse of discretion by the court by which said defendant was prevented from having a fair trial.

4. Irregularity of the proceedings of the prevailing party by which said defendant was prevented from having a fair trial.

5. Misconduct of the prevailing party.

6. Accident and surprise which ordinary prudence could not have guarded against.

7. Said judgment is not sustained by sufficient evidence, and is contrary to the evidence.

8. Said judgment is not sustained by any evidence.

94 9. Said judgment is contrary to law.

10. Newly discovered evidence material for said defendant and which said defendant could not with reasonable diligence have discovered and produced at the trial.

11. Errors of law occurring at the trial and excepted to by said defendant at the time.

THE CITY OF OKLAHOMA CITY, *Defendant*,
By JOHN H. WRIGHT, *City Attorney, and*
DOUGLAS AND DOUGLAS, *Its Attorneys.*

No. 2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Motion for new trial. Filed in district court, Oklahoma county, O. T., April 29, 1901. B. D. Shear, clerk. M. McKinley, deputy.

95 And thereafter on the 1st day of June, 1901, the following proceedings were had in said cause, to-wit:

96 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court within and for said County.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Journal Entry of Order.

Now on this 1st day of June, 1901, it being one of the judicial days of the regular February, 1901, term of said court, this *this* cause came on to be heard upon the motion for a new trial of said cause, filed herein by the plaintiff on the 29th day of April, 1901, and thereupon the said plaintiff moved that said motion of defendant for a new trial of said cause be stricken from the files of said cause and be not considered for the reason that said motion for a new trial was not made and filed within three days time required by law after the rendition of the judgment in said cause, and which said motion of plaintiff that said motion of defendant for a new trial of said cause be stricken from the files and be not considered, was, upon due consideration of the court, overruled and denied, to which ruling the plaintiff excepted, and thereupon said motion of plaintiff for a new trial of said cause was duly submitted and argued by counsel for plaintiff and defendant, and the court, having heard the arguments of counsel and having duly considered the same and being fully ad-

vised in the premises, the said motion for a new trial is by the court overruled, to which order of the court, so overruling said motion for a new trial, the said defendant, The City of Oklahoma City, then and there duly excepted and excepts and, upon the application of said
97 defendant, forty five days is given to said defendant to make and serve a case-made herein for the supreme court of said Territory, and the plaintiff is granted and allowed ten days thereafter in which to suggest amendments to said case-made, and said case-made shall be presented to the judge of said court for settlement upon five days notice given by either of said parties; and it is further ordered that a stay of execution for twenty days in said cause is hereby awarded and allowed without bond, and said defendant is allowed said period of twenty days within which to execute a supersedeas bond to said plaintiff conditioned as by law required for the further stay of execution pending the prosecution of its appeal on error to the supreme court *by* the Territory, with good and sufficient sureties to be approved by the clerk of said court in the sum of two thousand dollars.

B. F. BURWELL,
Judge of said Court.

Endorsements: 2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Order. Filed June 1, 1901. B. D. Shear, clerk, by M. McKinley, deputy. Filed Aug. 5, 1901. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

98 And thereafter on the 8th day of July, 1901, the following proceedings were had in said cause, to-wit:

99 TERRITORY OF OKLAHOMA, } *ss:*
Oklahoma County, }

In the District Court of the Third Judicial District Held in and for said County and Territory.

FRANK MCMASTER, Plaintiff, }
vs. }
THE CITY OF OKLAHOMA CITY, Defendant. }

Now on this the 8th day of July, 1901, the above entitled cause came on to be heard on motion of defendant for an extension of time in which to make case for supreme court, and for good cause shown, said time is hereby extended to August 1st, 1901, and ten days thereafter to suggest amendments, and five days to serve case thereafter.

B. F. BURWELL,
District Judge.

I have examined the foregoing case made, after due service thereof, and have no amendments to offer and accept the same as correctly

presenting the records and evidence in said case. And agree that the same may be settled and signed as of this date.

FRANK McMASTER, *Plaintiff.*

Dated July 17th, 1901.

Filed August 5, 1901,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

100 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

This is to certify that the above and foregoing case-made has been served in due time, and that said case-made was duly submitted to me for settlement and signing as required by law, by the parties to said cause, appearing before me by their respective attorneys; that the said case-made as above set forth is true and correct and contains a true and correct stat-ment of all the pleadings, motions, orders, evidence, findings, proceedings and judgments in said cause; and I hereby settle, allow, certify sign and file the same as true and correct, and I do hereby attest the same with my name and file the same of record as provided by law, and I do hereby order the clerk of this court to attest the same with his name and signature and the seal of said court and file the same of record as required by law.

Witness my hand at Oklahoma City, Oklahoma county, Territory of Oklahoma, on this the 17th day of July, A. D. 1901.

B. F. BURWELL, *Judge.*

Attest: B. D. SHEAR,
Clerk of the District Court, Oklahoma
[SEAL.] *County, Territory of Oklahoma.*

Filed Aug. 5, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court.
By JESSIE PARDOE, *Deputy.*

Endorsed: 1126. City of Oklahoma City *vs.* Frank McMaster. Petition in error and case-made. Filed in district court, Oklahoma county, O. T., July 17—1901. B. D. Shear, clerk. Filed, Aug. 5, 1901. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

101 And thereafter on the twenty-sixth day of August, 1901, there was filed in said court a motion to dismiss proceedings in error in said cause, which motion reads in words and figures as follows, to-wit:

102 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK McMASTER, Defendant in Error.

Cause No. 1126. Motion to Dismiss Proceedings in Error.

Comes now Frank McMasters, the defendant in error in said cause, and moves the court to dismiss the appeal and proceedings in error of the said plaintiff in error herein, for and upon the following grounds:

First. The judgment of this case was rendered in the district court on the 7th day of July, 1900, and the petition in error was filed in this court on August 5th, 1901, more than one year after the date of the rendition of the said judgment, and therefore the appeal and proceedings in error in this cause were instituted after a lapse of one year from date of said judgment, and at the time such appeal and proceedings in error were barred by the statutes of limitation of the Territory of Oklahoma. (See Record, pg. 53)

Second. The motion for a new trial in this cause, in the district court, was made and filed on the 29th day of April, 1901, and therefore was filed more than three (3) days after the date of said judgment rendered, to-wit, on the 7th day of July, 1900; and the said motion contained merely the statutory grounds for a new trial which was required to be filed within three (3) days from the date of judgment and no grounds are set forth in said motion as the cause or basis or excuse for the filing thereof, after the said expiration of three (3) days, and none of the grounds set forth in said motion are cognizable or could be sustained by the district court or by this court under the law. (See Record, pg. 63–64)

103 Third. The motion for a new trial of the said cause in the district court is not directed against any order in the record, reinstating the original judgment in the cause, and there is no proceeding or attack upon or against the order of reinstatement. Said judgment and the said order so reinstating said judgment have become final and conclusive.

Fourth. The appeal in this case, by its terms and on its face, is taken from the original judgment only, and is limited to a complaint against the rendition thereof.

COTTERAL & HORNOR,
Attorneys for Defendant in Error.

Service of the foregoing motion by a true copy is accepted this 24th day of August, A. D. 1901.

JNO. H. WRIGHT,
Attorney for Plaintiff in Error.

Filed Aug. 26, 1901,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed: 1126—City Ok. City, pl'ff in error, *vs.* Frank McMaster, def't in error—Motion to strike, etc.—Filed Aug. 26, 1901—Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy. Cotteral & Hornor, att'ys — def't.

104 And afterwards on the third day of September, 1901, there was filed in said court, in said cause, suggestions in opposition to motion to dismiss, which suggestions read in words and figures as follows, to-wit:

105 In the Supreme Court of the Territory of Oklahoma.

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

Comes now the above named plaintiff in error and hereby makes the following suggestions why the motion of defendant in error should be overruled:

First. The district court in the same judgment rendered on the 7th day of July, 1900, set aside said judgment and granted a new trial, and did not reinstate said judgment until the 29th day of April, 1901. Hence there was no judgment for the plaintiff in error to complain of until the last named date, and the plaintiff in error then and there filed its motion for a new trial. As was said by our supreme court in the case of Severly *vs.* C. R. I. Ry. Co. 6 Okla. 153, "A motion for a new trial is a useless proceeding until there is a judgment to set aside or vacate."

Second. The district court found and held that the motion for a new trial was filed in time.

Third. The motion for a new trial covers all the statutory ground.

Fourth. The appeal also claims error on the part of the district court in reinstating said judgment on the 29th day of April, which was duly excepted to by the plaintiff in error, and made one of the assignment- of errors.

Wherefore plaintiff in error prays that the motion of defendant in error to dismiss said appeal be overruled.

Respectfully submitted.

DOUGLAS & DOUGLAS AND
JNO. H. WRIGHT,
Att'ys for Plaintiff in Error.

106 Said suggestions in opposition to motion to dismiss are endorsed as follows:

No. 1126—The City of Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error—In the supreme court of the Territory of Oklahoma—Suggestions—Filed September 3, 1901, Benj. F. Hegler, clerk supreme court.

107 And thereafter, at the June, 1901, term of said supreme court, on the sixth day of September, 1901, the following proceeding was had in said cause, to-wit:

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } # 1126.

And now the court overrules the motion to dismiss this cause, the last order therein having been made within the year allowed for appeal.

108 And thereafter, at the January, 1902, term of said court, on the seventh day of January, 1902, the following proceeding was had in said cause, to-wit:

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } # 1126.

Ordered by the court: That this cause be now taken on briefs of both parties.

109 And thereafter, at the June, 1903, term of said supreme court, on the sixth day of June, 1903, the following proceeding was had in said cause, to-wit:

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } # 1126.

And now this cause comes on for final decision and determination by the court upon the record and briefs submitted therein. And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error, the said City of Oklahoma City.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed at the cost of plaintiff in error, the said City of Oklahoma City.

Opinion by Irwin, J., all the justices concurring except Burford, C. J. and Burwell, J., not sitting, and Pancoast, J., dissenting, in an opinion herewith.

Which said opinion and dissenting opinion read in words and figures as follows, to-wit:

110 In the Supreme Court of the Territory of Oklahoma, June Term, 1903.

Filed June 6, 1903.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } No. 1126.

Syllabus.

1. Where errors are assigned in the petition in error, but are not mentioned in the argument or brief of counsel, and are not relied upon in the argument or brief for a reversal of the judgment complained of, they will be deemed waived and abandoned, and will not be regarded in this court.
2. Where an occupying claimant has entered upon public lands which are open to settlement, and has made settlement thereon, for homestead purposes, and has legal vested rights therein, such rights can not be taken from him for public use, except by due process of law, and the payment of just and reasonable compensation therefor.

Error from the district court of Oklahoma county. B. F. Burwell, trial judge.

Affirmed.

Appearances: Jno. H. Wright and Douglas and Douglas, for plaintiff in error. Cotteral and Hornor, Frank McMaster for defendant in error.

111 *Statement of the Case.*

This is an action brought by the defendant in error Frank McMaster, against the plaintiff in error, The City of Oklahoma City, in the district court of Oklahoma county, on the 22nd day of September, 1899, for the recovery of the possession of two certain lots, to-wit, lots numbers one and two of block number twenty four of the original plat of said city, as filed in the United States Land Office, to recover the possession of said lots, and damages for the wrongful detention thereof. The original petition in said case is in words and figures as follows:

"TERRITORY OF OKLAHOMA, }
Oklahoma County. }

In the District Court, 3rd District.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Petition.

Now comes the plaintiff herein complaining and says:

1st. That the defendant is a municipal corporation of Oklahoma Territory, being a city of the first class, and located in Oklahoma county, aforesaid.

2nd. That the plaintiff is the legal and equitable owner of the real estate herein described, and fully entitled to the possession thereof, and of which the defendant unlawfully keeps him out of the possession, being a part of the south east quarter (1/4) section thirty three (33) town 12, north range 3 west in said county, and Territory more particularly described as follows: Commencing at a point in said city on the south east corner of block twenty three, (23), as shown by the trustees' plat, being the plat now in use in said city, and running thence southerly on a straight line, with the west line of Broadway street, as shown by said plat, thirty three and ten one hundredths, (33.10) feet from the south east corner of the block aforesaid to the place of beginning; thence west from said place of beginning, one hundred and forty feet, (140) thence south at a right angle with the line aforesaid, fifty (50) feet, thence east parallel with said east and west line, first named one hundred and forty feet, (140) thence north parallel with said north and south line, fifty (50) feet to the piace of beginning.

3rd. That prior to the filing hereof being far more than four weeks, thereto, plaintiff presented his claim to defendant for uses, rents, and profits thereon, as well as a demand for possession of said real estate, described as aforesaid, but that the defendant refused to pay said claim, and still retains possession of said real estate, to the damage of plaintiff in the sum of two hundred and fifty, ($250.00) dollars, per year, since the 14th day of November, 1892.

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4th. Said real estate is further described on the Dick plat, being the original plat of said city, as lots No. one (1) two (2) of block No. twenty-four (24) of said plat, as filed in the U. S. Land Office.

Wherefore the plaintiff prays judgment herein against defendant:

1st. For the recovery of said real estate, and damages for withholding the possession thereof.

2nd. For other and further relief.

FRANK McMASTER, *Plaintiff.*

H. H. HOWARD, *Attorney.*

No. 2053. Frank McMaster *vs.* Oklahoma City. Amended petition. Filed Sept. 22, 1899. B. D. Shear, clerk. H. H. Howard, att'y.

To said petition the defendant, on the 10th day of October, 1899, filed its demurrer, in words and figures as follows, to-wit:—

"TERRITORY OF OKLAHOMA, *County of Oklahoma,* } *ss.*:

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Demurrer.

Comes now the defendant, The City of Oklahoma City, and demurrs to the petition of the plaintiff filed on the 22nd day of September, 1899, and for cause and grounds of said demurrer, says: That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiff, and against said defendant.

THE CITY OF OKLAHOMA CITY, *Defendant,*
By JOHN WRIGHT AND DOUGLAS AND DOUGLAS,
Its Attorneys.

#2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Demurrer. Filed in district court Oklahoma county, O. T. October 10, 1899. B. D. Shear, clerk, by M. McKinley, deputy. Re-filed by leave of court, Nov. 20, 1899. B. D. Shear, clerk.

Which demurrer was by the court overruled, to which the defendant excepted.

113 That thereafter on the 24th day of November, 1899, the defendant filed its answer in said cause, which is in words and figures as follows to-wit:—

TERRITORY OF OKLAHOMA, *County of Oklahoma,* } *ss.*:

In the District Court.

FRANK MCMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } Answer.

1. Now comes the said defendant, The City of Oklahoma City, and for answer to the petition of said plaintiff in said cause, on the 22nd

day of September, 1899, denies each and every allegation and averment therein contained, except such as hereinafter expressly admitted.

The said defendant admits that it is a municipal corporation and city of the first class, as alleged in said plaintiff's petition.

2. The defendant further answering says that the tract and parcel of land claimed by said plaintiff and described in said plaintiff's said petition, is a part of the original townsite of the city of Oklahoma City, in the Territory of Oklahoma, and is situated and is included in and is a part of Grand avenue, a public highway and street of said city, as the same appears upon the original plat and survey of said city, which said plat and survey was approved by said board No. 2, of townsite trustees of Oklahoma City, on the 6th day of September, 1890, and recorded under and by the direction of said board, in the office of the register of deeds of Oklahoma county, Territory of Oklahoma, on the 8th day of September, 1890, in Book No. One of plats of the records of said county, at pages two, three and four of said book.

That said public highway in said city, to-wit, said Grand avenue, with the said land claimed by plaintiff, included therein, was and had been for more than one year prior to the approval of said plat and survey, by said board No. 2, of townsite trustees, and the filing of said plat so approved, in the office of the register of deeds of Oklahoma county, as aforesaid, and has been at all times since, used and occupied exclusively as a public highway, and a street of said city by the inhabitants of said city, and Territory, at all times, and was so exclusively used as a public highway and street long before the organization of said city as a municipal corporation, and that said plaintiff was not during any time in possession of said parcel of land, now claimed by him, and had no interest therein.

Wherefore defendant prays judgment for its costs herein, against said plaintiff.

THE CITY OF OKLAHOMA CITY,
Defendant,
By JOHN H. WRIGHT, *City Attorney, and*
DOUGLAS AND DOUGLAS, *Its Attorneys.*

2053. Frank McMaster, plaintiff, *vs.* The City of Oklahoma City, defendant. Answer. Filed in district court, Oklahoma county, O. T. Nov. 24, 1899. B. D. Shear, clerk, by M. McKinley, deputy.

114 And on the 5th day of Feb. 1900, the plaintiff filed his reply, in words and figures as follows:—

TERRITORY OF OKLAHOMA, *Oklahoma County,* } ss:

In the District Court.

FRANK McMASTER, Plaintiff,
vs.
THE CITY OF OKLAHOMA CITY, Defendant. } #2053. Replication.

Now comes plaintiff — for replication to the answer filed herein says:—

He denies each and every allegation of said answer, and every and all of the averments therein, which contradict the averments, counts and allegations of the plaintiff's petition filed herein.

Wherefore, he, the plaintiff, prays judgment as asked in said petition.

FRANK McMASTER, *Plaintiff.*
H. H. HOWARD,
Att'y for Plaintiff.

#2053. Replication. Frank McMaster, *vs.* Oklahoma City. Replication. Filed in district court, Oklahoma county, O. T. Feb. 5th, 1900. H. H. Howard, attorney. B. D. Shear, clerk, by M. McKinley, deputy.

And on the fifteenth day of February, 1900, at a regular term of the district court of the third judicial district held in and for Oklahoma county, in the Territory of Oklahoma, the said cause came on for trial before the Hon. B. F. Burwell, presiding judge, jury having been waived, and the plaintiff introduced in evidence patent from the United States Government to the townsite trustees. Objected to. Overruled. Exception. Plaintiff then introduces judgment rendered in the case of McMaster *vs.* The Townsite Trustees, by Justice John H. Burford, on the 14th day of November, 1892, to which defendant objects. Objection overruled. Exception. The plaintiff then offers in evidence a certificate of the register of deeds, upon that judgment, showing that it had been recorded in his office, in Oklahoma county, wherein said land is situated. Objected to. Overruled. Exception.

Plaintiff then offers in evidence a further order of the district judge, Burford, in the same case, dated October 13th, 1893,
115 with a certificate of the register of deeds of Oklahoma county, showing that the same had been recorded in his office. Objected to. Overruled. Exception. Witnesses are then sworn and testify as to the rental values. Here the plaintiff rests. Defendant demurs to the evidence. Whereupon, attorney for the plaintiff, by leave of the court, introduces as further evidence in the case, the journal and the order made by the court in case No. 278, of the dis-

trict court of Oklahoma county, entitled Frank McMasters *vs.* Edgar N. Sweet, Levi E. Coe and David H. Hammons, townsite trustees. Said order and journal granting a change of venue, in said cause. And thereafter, the said defendant refiles its demurrer to the evidence of the plaintiff; which demurrer is overruled, and exception. The defendant introduces testimony to show the final receipt of the local land office to the townsite trustees. No objection, same is admitted and read in evidence. The defendant then offers in evidence a plat of the city, approved by the board of townsite trustees No. 2. Objection, overruled. Exception.

The defendants proves by the register of deeds that the plat is one of the plats of record in the office of the register of deeds of this county. The defendant offers in evidence entries of the county commissioners' proceedings, in Book One, page- 11-12 and 13. Objection. Overruled. Exception.

Here the defendant rests. Whereupon the court rendered judgment in favor of the plaintiff for the recovery of the possession of said real estate together with damages for the wrongful detention thereof, in the sum of two hundred and fifty dollars per year, for the three years prior to the commencement of this action up to the execution of this judgment, and against the defendant for costs. To which order and judgment of the court the defendant then and there excepted.

116 Whereupon the defendant, by notice on the journal of said court, demanded a second trial, which demand is granted, and said judgment is set aside and vacated, and said cause is continued until the next term of this court.

Thereafter, on the 21st day of January, 1901, plaintiff filed a motion to set aside the order granting a new trial as a matter of right, on the ground that said notice, and the proceedings thereunder are wholly void, without right or authority, and asking that the court reinstate the judgment in said cause, on the 7th day of July, 1900, in favor of the plaintiff, which motion the court sustains, to which the defendant then and there excepts. On the same day the defendant files its motion asking the court for a new trial in said cause, on statutory grounds; plaintiff moves that said motion for a new trial be stricken from the files, for the reason that the same is not filed within the three days' time required by law, after the rendition of judgment, in said cause, which said motion was, upon the consideration of the court, overruled, to which the plaintiff excepts. Whereupon said motion for a new trial in said cause was duly submitted and argued by counsel for plaintiff and defendant, and overruled, to which ruling the defendant excepts, and brings the cause here for review.

Opinion of the court by IRWIN, *J.*:

The assignments of error in this case may be condensed into three, viz: First, overruling the demurrer of defendant to plaintiff's petition. Second, error of the court in setting aside the order of the

court made granting a new trial to the defendant, as a matter of course, without showing cause, entered in the journal, and the reinstating of the judgment in favor of plaintiff; and third, error
117 of the court in rendering judgment in favor of the plaintiff, instead of the defendant.

While the assignments of error made by the plaintiff in error are more numerons than these, we think these three assignments include all of those assigned by the plaintiff in error. Plaintiff in error makes eight assignments of error, but his second and third, it seems to us are included in the first assignment of error as herein set forth. The fourth assignment of error charges that the court erred in admitting as evidence against said plaintiff in error, and over its objection, a copy of a certain pretended judgment of the district court of Canadian county, rendered in an action in said last named court, in which the defendant in error was plaintiff, and the townsite trustees were defendants; and fifth, the court erred in admitting over the objection of the plaintiff in error, a copy of a certain order or judgment of the said district court of Canadian county, made at Kingfisher county, on the 13th day of October, 1893, in an action between the said parties. The sixth and seventh assignments of error are simply general assignments of error in admitting improper evidence on the part of plaintiff, and the eighth, that said district court erred in rendering judgment in favor of defendant in error, instead of plaintiff in error. We think all of the fourth, fifth, sixth and seventh assignments of error can be considered in the eighth, to-wit, that the court erred in rendering judgment in fav or of the plaintiff.

The first and second assignments of error as herein set forth it will not be necessary for this court to pass upon, because by the long established and well settled rule of this court, founded upon the adjudication of many of the supreme courts of other States and Territories, on the same question, these assignments of error have been abandoned by the plaintiff in error. It is a well settled rule
118 of this court that where error is assigned, and the attorney for the plaintiff in error fails to insist upon and argue the same in his brief, this court will treat such assignment of error as having been abandoned.

In the case of Gardenhire *vs.* Gardenhire, 2 Okla. 484, this court says:

"Where errors are assigned in the petition in error but are not mentioned in the argument or brief of counsel and are not relied upon in the argument or brief for the reversal of the judgment complained of, they will be deemed waived and abandoned and will not be regarded by the Supreme Court."

In Peters *vs.* The United States, 2 Okla. 136, this court in an opinion rendered by the present Chief Justice says:

"A number of other rulings of the trial court are complained of and errors assigned calling in question their correctness, but as they

are not discussed in appellant's brief, they must be taken as waived and abandoned, and we shall not give them consideration."

In the case of Hurst *vs.* Sawyer, 3 Okla. 296, this court says:

"An assignment of error, which is not relied upon in the brief of counsel for a reversal of the case, will not be considered by this court, nor will this court review a question partially discussed, when counsel, in closing his brief, chooses to abandon it, and rely entirely upon another proposition, and when counsel on the other side have relied upon such withdrawal."

In Provin *vs.* Lovi, 6th Okla. 94, the court says:

"Where an error is assigned and not presented and argued in the brief of counsel for appellant, and no authorities are cited in support of the contention and counsel for plaintiff treat the question as abandoned, this court will not review the same."

In Penny *vs.* Fellner, 6th Okla. 386, the court says:

"This court will not examine the record filed herein, in search of prejudicial errors which are not clearly pointed out and insisted upon in the brief of the complaining party, but all such errors (if any) will be considered as waived."

In Huntley *vs.* The Territory, 7th Okla. 60, this court says:

"Numerous other errors are assigned in the petition in error. We have considered all that have been presented in the briefs, or argued by counsel for plaintiff in error. Under the settled rule of this court such assignments of error as are not presented and relied upon in the argument or brief of counsel are deemed waived and abandoned, and will not be considered by this court."

119 This doctrine has been repeatedly followed and often sanctioned by the Kansas supreme court. In the case of Topeka Primary Association *vs.* Martin, 39 Kans. 750, the court there holds:

"That errors not specifically pointed out and relied on in the brief of counsel, will not be considered."

In the case of Wilson *vs.* Fuller, 9th Kansas, 176, the court say:

"Where errors are assigned in the petition in error, but no reference is afterwards made to them, either by oral argument or in the brief of counsel for plaintiff in error, the supreme court will take no notice of them."

In School District *vs.* Foster, 11 Kans. 447, it is said:

"Other errors were assigned in the petition in error, but as they have not since been referred to, in the brief of counsel or otherwise, we suppose they have been abandoned, and we shall therefore take no notice of them."

In Davis *vs.* Filmore, 15 Kans. 333, the court holds:

"Where error is assigned but not briefed, it must be presumed to have been waived and abandoned."

In Campbell *vs.* Phillips, 28th Kans., 754, the court says:

"Of course our inquiry will be limited to the single matter counsel discuss in their brief."

In Bailey *vs.* Dodge, 28 Kans, 72, it is held:

"Where errors are assigned but not insisted upon in the brief of counsel, the supreme court will not consider them."

In The State of Kansas *vs.* Stewart, 84 Kans. 250, the court, speaking by Justice Brewer, says:

"Ordinarily this court will consider only such questions as are specifically pointed out and discussed by counsel, and will not search through the record for the sake of finding errors."

This same doctrine is held in Howard *vs.* Cobb, 6th Ind. 5, and in Robinson *vs.* Tipton, 31 Ala. 595.

Hence we take it that this rule is too well established, and has too long been followed by this and other courts to now be disturbed, and as we have carefully and repeatedly searched the brief of plaintiff in error, and do not find as to the first or second assignment of error, the slightest reference, not a word nor a line thereon
120 is contained in such argument, nor are any authorities cited; hence, following the rule, we are constrained to treat these two assignments or error as abandoned, and only notice the other assignments of error, which, in our judgment can very properly be considered in the one assignment of error which charges error of the district court in the judgment rendered.

The evidence in this case shows that the lots in controversy were a part of a tract of land conveyed by the United States to certain trustees for townsite purposes, as shown by the patent in evidence.

By this conveyance the land was to be held in trust by said trustees, for the occupying claimants, and such trustees were made agent for such claimants, and such lands were also held in trust *sub modo* for the Government until the rightful claimants could be established, and the manner of disposing of the surplus land ascertained. This land by the act of Congress was open for legal settlement on the 22d day of April, 1889. The defendant in error, in his petition herein, claims that he had on the day that such land was opened for settlement, and not before, legally entered such lots, and went into possession thereof as an occupying claimant, and that under the rules and regulations of the land office he was entitled to a deed at the hands of the townsite trustees. Now the first question to be settled in this controversy is: Was the defendant in error an occupying claimant, such as is recognized by the land laws of the United States, and entitled to a deed at the hands of the townsite trustees? If this position is correct then under the laws regulating the granting of this tract to the townsite trustees, they held that portion of the same on which he was an occupying claimant, in trust for him. The Government by the conveyance by patent vested the title of this land in the trustees, for the express purpose
121 of having the title conveyed to those who were entitled to claim as occupying claimants. To prove this possession, the defendant in error offered in the court below certain findings of the district court of Canadian county, Oklahoma Territory, which he claims amount to a judgment in his favor, in a certain case therein pending wherein he was the plaintiff and the townsite trustees were

the defendants, said cause having been taken to Canadian county on a change of venue, from the district court of Oklahoma county, where said land is situated, and where said trustees resided.

The objection to the introduction of this judgment, of Canadian county, was that the plaintiff in error here, The City of Oklahoma City, was not a party to that record, and consequently not bound thereby; but it seems to us that as the townsite trustees, by the patent had conveyed to them the land, and by the law under which they acted was made the agent not only of all the occupying claimants, but also of the Government, and held the land in trust for such claimants, that any and all persons claiming title to any portion of such land, must claim the same through the townsite trustees; that the plaintiff in error here, if any title whatever it had, must have derived the same from a common source of title, to-wit, the townsite trustees, and as such grantee of the townsite trustees would be bound by any judgment legally rendered against such trustees.

In the case of Caldwell *vs.* Colorado Springs, 100 U. S. 55, it was held:—

"That as all had a right to appear, it bound all parties. The trustees represent all rights, and their action bound all claimants."

In Kennison *vs.* Stewart, 93 U. S. 84, it was held;

"That all beneficiaries, although not parties, are bound by judgments against trustees, unless such judgment is impeached for fraud or collusion."

122 The second objection urged by plaintiff in error herein to the introduction of this judgment of the district court of Canadian county in the court below, was that the findings do not amount to a judgment. What is a judgment? We think it is a final conclusion by a court of competent jurisdiction of a question of law or fact, at issue between the parties thereto, and properly submitted for adjudication. Now in this case the proper parties were before the court, to-wit: the defendant in error, who claimed the right to a deed, and the townsite trustees, in whom the Government had vested the title, for the purpose of ascertaining who the legal occupying claimants were, and who was entitled to deeds for the various tracts of land embodied in the patent.

Now as the court found the facts and decided the question submitted to it, and as no question of jurisdiction was there raised, and as no question of jurisdiction is raised in the district court in this case, or in this court, on appeal, and as no appeal was taken from the findings and judgment of the district court of Canadian county, we think the presumption obtains that the court had jurisdiction of the subject-matter and of the parties, and that the necessary preliminary steps to give the court jurisdiction had been complied with; this being true, we are at a loss to see why the finding of that court as to the facts therein submitted were not binding and conclusive upon not only the parties, but all persons claiming title under or through them. Now what did the district court of Canadian county find as to the facts? By a reference to the copy of the

records of that court as shown in Exhibit A, of the case made herein, it will be seen that that court there found that the defendants in that case, Edgar N. Sweet, Levi E. Coe and David H. Hammons, were trustees of the townsite of Oklahoma City, in said county, for the benefit of the actual occupants thereof, under the act of Congress approved May 14th, 1890. That said tract of land described in said patent to said trustees, was on the 22nd day of April, 1889, opened to settlement under the
123 act of Congress approved March 2nd, 1889. That such tract of land was settled upon and occupied as a townsite shortly after noon of said day, and has continued to be and was at the time of said finding still held and occupied. The court further finds that on said 22nd day of April, 1889, the people then occupying said townsite had platted said tract of land into lots, blocks, streets and alleys, and the court further finds that the plaintiff there (that is the defendant in error herein) on said day, to-wit: the 22nd day of April, 1889, legally entered upon and occupied the particular piece or parcel of ground in controversy in this suit, and has continued to claim the same, that said piece or parcel of ground at that time was lots one and two in block twenty-four, according to the plat. The court finds that subsequent to such occupancy, and prior to the conveyance to said trustees, a different plat and arrangement of the streets, alleys, lots, and blocks, was adopted and enforced by the parties occupying said townsite; that by said change of the plat, the land claimed by the plaintiff was thrown into the street, in Grand avenue, and the court finds that the plaintiff did not consent, but objected to said second plat, and has never consented thereto or acquiesced therein. That thereafter the plaintiff in that case (defendant in error here) was forcibly removed from said parcel of ground, and has since that time been forcibly kept from the occupancy of said ground. That on the 21st day of April, 1891, the plaintiff applied to said defendants as said trustees, for a deed to said lots, that said trustees found the facts substantially as above stated, but declined to issue a deed therefor, and the court further finds that said city of Oklahoma City has appropriated said lots to its own purposes as a street, and had appropriated the same prior to the conveyance of said tract by the United States to said trustees:
124 the court further finds that said plaintiff was not occupying said tract of ground at the time the United States conveyed the same to the defendants as trustees, but said portion of said tract was at the time used and treated as a street of said city.

Now this finding of the court shows that at the time that this land was opened for settlement under the act of Congress the defendant in error herein had legally entered upon said tract of land, and was occupying it, in accordance with the rules and regulations of the Land Department. That being true we take it that his interest and rights in said land attached at that time. That when he had complied with the rules and regulations of the Land Department, he was entitled to a deed. That he had a vested interest in these lots, and

that any other occupying claimant, or any number of occupying claimants, who made up the townsite, at that time or subsequent, had no right to so change the plat as to take from him his interests in said lots, and put them into a public street or highway without his consent. Such a proceeding would be in violation of the Constitution of the United States, and would be taking private property for public use, without compensation. The townsite trustees would have no right to deprive him of any property that he might have by virtue of his prior settlement, in these lots, and devote it to street purposes, without his consent and without compensation. His rights must be determined, it seems to us, by the conditions as they existed at the time of his settlement, upon these lots, which, according to the findings of the district court of Canadian county, was on April 22nd, 1889. If at that time he had complied with the law, and the rules of the Land Department, and was entitled to a deed, then no subsequent action of the occupying claimants, of the townsite, or the townsite trustees, or the city of Oklahoma City, could take away his rights without his consent, except upon some legal proceeding, and for adequate compensation.

125 In the case of Sturr *vs.* Beck, reported in the 133 U. S. at page 545, the Supreme Court of the United States say:

"* * * Any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws, the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement."

In Witherspoon *vs.* Duncan, 4th Wall. 210–218, it is said:

"* * * In no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property. * * *"

In the decision in the case of Sturr *vs.* Beck, *supra*, the court says:

"* * * And as to mere settlement with the intention of obtaining title, under the preëmption laws, while it has been held that no vested right in the land as against the United States is acquired, until all of the prerequisites for the acquisition of title have been complied with, yet rights in parties as against each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. 'The patent, which is afterwards issued, relates back to the date of the initiatory act, and cuts off all intervening claimants.'"

In Burlington K. and S. W. R. Co. *vs.* Johnson, 16 Pac. 125, the supreme court of Kansas say:

"A settler on the public lands of the United States who makes a valid homestead entry, and continues to reside on and improve the land entered, in compliance with the land laws, has the exclusive right to its possession and use, and to the improvements made thereon, and he also acquires equities in the land itself, which increase from the time the entry is made until the complete title is earned.

126 "Such a settler may sell and transfer a portion of his homestead for a right of way for a railroad, or his interest therein may be condemned and appropriated for such purpose upon adversary proceedings, and by paying full compensation to the settler therefor.

"A homesteader who has entered, and is proceeding lawfully to perfect his title to the land entered suffers an injury by the building of a railroad over his homestead which differs only in degree from that sustained from the same cause by one who has the complete title."

Section 2339 of the Revised Statutes of the United States provides:

"Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

But it may be contended that the defendant in error was not in the possession of said lots, and has abandoned the same, but a reference to the finding of fact by the district court of Canadian county will show:

"That thereafter the plaintiff was forcibly removed from said parcel of ground, and has since that time been forcibly kept from the occupancy of said grounds."

"That he did not consent but objected to the platting of said land as a street."

And under the holding of this court in the case of Cook *et al. vs.* McCord *et al.*, 9 Okla. page 200, and the holding of the United States Land Department in Betts *vs.* Townley, 20 L. D. 425, this is not abandonment, but preserves his entry intact.

Hence, it seems to us that if the findings of the district court of Canadian county were correct, and that the defendant in error, McMaster, was a legal occupying claimant upon the land at the time the patent was granted to the townsite trustees, then no action of such townsite trustees or the city of Oklahoma City, or the other occupying claimants, could divest him of his right in the property in question, without his consent, and without compensation.

127 We think there was no error on the part of the district court of Oklahoma county, in admitting the record of this judgment as evidence.

The defendant below, plaintiff in error here, claims that the court erred in admitting as evidence a certified copy of a certain order of the district court of Canadian county, made in Kingfisher county. But a reference to that order will show that it was an order designed to execute a previous order of that court. The order was in the nature of a mandamus, which, if the finding of the Canadian county court was that the defendant in error, McMaster, was entitled to a deed, at the hands of the townsite trustees, this would be the only adequate means by which the court could enforce such judgment. But it seems to us that the order made in Kingfisher county, has but little bearing upon the merits of this case, for the reason that the rights of the parties had already been determined, by the finding of the district court of Canadian county, in the order heretofore admitted by the court. If the finding of that court was correct, and, its correctness, it seems to us, cannot now be questioned, after the time for appeal has expired, then McMaster was entitled to a deed at the hands of the townsite trustees, and such finding of the court was conclusive.

Hence, we think the decision of the lower court was correct, and the judgment is hereby affirmed; not intending that this opinion shall be at variance with the doctrine laid down in the case of City of Guthrie *vs.* Beamer, 3 Okla. 652, the facts in the two cases being different.

All the justices concurring except Burwell, J. and Burford, C. J., not sitting, and Pancoast, J., dissenting.

128 Dissenting opinion by PANCOAST, J.:

I cannot concur in the foregoing opinion. McMaster acquired no vested interest in the land claimed by him by reason of his settlement and occupancy thereof; the land upon which he made settlement being designated by the plat and survey as a street divested him of whatever interest he may have had.

The City of Guthrie *vs.* H. C. Beamer, 3 Oklahoma, 652.

A townsite settler cannot maintain an action against a board of townsite trustees appointed under an act of Congress to compel a conveyance to him of property upon which he has made settlement.

The case of McMaster *vs.* The Townsite Trustees tried in Canadian county never went to judgment the court in that case never proceeded further than to make findings of facts in the case, this was not rendering a judgment; findings of fact by a court in a case tried to the court have no more force nor effect than the verdict of a jury, when the case is tried to a jury.

The order made in Kingfisher county did not help matters as the judge had no power or authority to make an order or render judgment in the case when absent from the county, such order was a nullity.

A settler claiming property under the United States townsite laws, before he can maintain an action in the territorial courts to

litigate his claim must make application to the townsite trustees for a deed and if the trustees refuse to convey to him he must appeal and litigate the matter through all the branches of the Interior Department, if he fails to do this he abandons his claim whatever it may be.

By platting Government land as a townsite into lots, blocks, streets and alleys, the streets and alleys designated are dedicated as streets and alleys to public uses and when a municipal cor-
129 poration is afterwards organized covering the territory embraced in such townsite such municipal corporation where no conveyance has been made to it of the streets and alleys does not become invested in the fee of such streets so as to enable one claiming a portion thereof to maintain an action for the title thereto.

130 And afterward, to-wit, June 16, 1903, defendant in error filed in said supreme court his petition for a rehearing of said cause, which petition reads in words and figures as follows, to-wit:

TERRITORY OF OKLAHOMA:

In the Supreme Court.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } No. 1126.

Error from the district court of Oklahoma county, B. F. Burwell, judge, June term, 1903.

Opinion filed June 6.

Now comes the defendant in error herein and petitions the court for a rehearing of the opinion so rendered herein at said term, for this that:

1. Said court in said opinion overlooked the gen. sec. 4452, Civil Proc. 574 Ok. Stat. 1893, p. 858, which especially requires the filing of the appeal or writ of error as filed herein within one year from the date of entry of the judgment or order appealed from.

2. That said court in said opinion overlooked the date of the rendition and entry of the judgment of the district court herein appealed from, and the date of filing the case made herein, to-wit:

Judgment district court entered July 7th, 1900.

Case-made herein filed in supreme court, August 5, 1901.

3. The said sec. of the said statute, when applied to said dates was a ruling and controlling statute.

131 4. This court overlooked in the decision herein the case of Doorley *v.* The Buford & George Manufacturing Co., 59 K. 594, which is a controlling case upon the writ of error herein.

5. The question herein is jurisdictional, *i. e.* Was the appeal taken in time, as by statute required? And was presented by motion and also by the defendant's brief in the argument of this case, but thus far has been undecided although it is shown by the record in said cause that more than one year elapsed between the date of the entry of judgment in the district court and the making of the appeal herein, and said plaintiff in error, appellant herein, having shown no statutory excuse therefore.

Wherefore your petitioner asks that a re-hearing be had as to the question set forth herein and that if the facts be found as herein stated and shown, the writ of error herein be dismissed and a mandate issued and sent to the district court commanding that said court proceed to execute the judgment by it heretofore rendered in said cause.

FRANK McMASTER,
Att'y for Defendant in Error.

Endorsed: No. 1126—Supreme court—Oklahoma City, pl'ff, in error, *vs.* Frank McMaster, def't in error—Petition for rehearing—Filed June 16, 1903, Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

132 And afterward, to-wit, June 26, 1903, said plaintiff in error also filed its petition for a rehearing of said cause, which petition reads in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss*:

In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error, *vs.* FRANK McMASTER, Defendant in Error. } Petition for Rehearing.

Now comes the plaintiff in error and for its petition for rehearing says that a rehearing should be granted in the above entitled cause for the following reasons, to-wit:

First. That the question duly submitted by counsel was not correctly decided by the court and in conflict with the law, to-wit: That the judgment of the district court of Canadian county and decided by this court to be good, is absolutely void, and, in fact, no judgment, for the reason that defendant in error's only remedy, when the townsite board refused to issue him a deed, was to appeal to the Commissioner of the General Land Office of the United States, and, until the Land Department of the United States had finally passed on the case, the civil courts of the Territory of Oklahoma had absolutely no jurisdiction of the title to the land.

Second. That the decision is in conflict with the express statute of the Territory of Oklahoma, and of controlling decisions to which the court's attention was not called by the brief or oral argument, to-wit: General section 4729, page 1107, of the Revised Statutes of Oklahoma, (Wilson)

133 "In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial, by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term."

This statute is an exact copy of section — of the Kansas statute, which is as follows:

"In an action for the recovery of real property, the party against whom judgment is rendered may, at any time during the term at which the judgment is rendered, demand another trial, by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term."

The Kansas statute was construed in the case of Cheesebrough *vs.* Parker, 25 Ks. 566, Doster *vs.* Sterling, 33 Ks. 381, and like statutes from the State of Colorado in the case of Equator Company *vs.* Hall, 106 U. S. 86 and from the State of Illinois Mansfield *vs.* Excelsior Refining Company, 135 U. S. 326, have been construed by the United States Supreme Court and have been held to entitle the losing party in an ejectment suit to another trial; that another trial is a matter of right under the Oklahoma statute already cited, and that the case on the first trial in the ejectment suit was not fully presented to the trial court expecting that they would have a right as a matter of law, to another trial.

Third. That the motion for a new trial filed by plaintiff in error stricken from the files should have been considered and not stricken from the files for the reason that it was filed out of time on account of an unavoidable accident in this, that the trial court set aside the judgment and granted a new trial and said order remained in full force and effect until after the time expired required by stat-

134 ute for the filing of motions on general grounds for the filing of a motion for a new trial and no reason existed why a motion on the grounds in ordinary civil cases should have been filed within the statutory time for the reason that the judgment had been set aside and there was no way by which plaintiff in error could know or expect that said judgment would be reinstated and the order vacated granting a new trial; that plaintiff in error had a right to rely on the law under the statutes of Oklahoma Territory and the decisions hereinbefore cited.

Now, therefore plaintiff in error prays that it be granted a re-hearing in the supreme court, of this cause, and that it be permitted to make and present in its brief all of the errors saved in the record.

S. A. McGINNIS,
City Attorney in and for Oklahoma City and Attorney for Plaintiff in Error.

Endorsed: No. 1126—City of Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error—Petition for re-hearing—Filed June 26, 1903—Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

135 And afterward, to-wit, August 18, 1903, said defendant in error filed his affidavit of failure of plaintiff in error to serve petition for rehearing in twenty days, which affidavit reads in words and figures as follows, to-wit:

In the Supreme Court, Oklahoma Territory.

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } No. 1126.

Motion for Rehearing to the June Term, 1903.

Now comes Frank McMaster, defendant in error herein, and being first duly sworn on oath says, that a copy of the petition for rehearing was not served on the defendant in error within twenty days from the time of filing the opinion in said cause, as provided in rule XIX of said supreme court.

FRANK McMASTER
Defendant in Error.

Subscribed and sworn to before me this 17th day of August, 1903.

[SEAL.] T. F. HARWOOD,
Notary Public.

My commission expires March 17, 1906.

Endorsed: No. 1126. Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error—Affidavit of failure of pl'ff in error to serve petition for rehearing in twenty days.—Filed August 18, 1903. Benj. F. Hegler, clerk supreme court.

136 And afterward, to-wit, September 8, 1903, said defendant in error filed his motion to dismiss the petition of plaintiff in error, which said motion reads in words and figures as follows, to-wit:

In the Supreme Court of Oklahoma Territory.

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK McMASTER, Defendant in Error. } No. 1126.

Motion to Dismiss Plaintiff's Petition for Rehearing.

Now comes the defendant in error by Frank McMaster, attorney, and moves the court to dismiss said motion for this:

There is no proof of service of petition for rehearing within twenty days from the time of filing the opinion in said cause.

That the affidavit of Frank McMaster is filed herein showing that a copy of petition for rehearing herein was not served on defendant in error within twenty days from the filing of the opinion in said cause as required by the rules of said court.

Wherefore defendant in error moves the court to dismiss said petition for rehearing as filed herein by said plaintiff in error.

FRANK McMASTER,
Defendant in Error.

Endorsed: No. 1126—Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error—Motion to dismiss plaintiff's petition for rehearing—Filed September 8, 1903, Benj. F. Hegler, clerk supreme court.—Frank McMaster, att'y for def't in error.

137 And afterwards, on the 10th day of September, 1903, at the June, 1903, term of said supreme court, the following proceeding was had in said cause, to-wit:

CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK McMASTER, Defendant in Error. } # 1126.

And now this cause comes on for consideration by the court upon the motion for a denial of the rehearing of the same.

And the court having duly considered the same, and being fully advised in the premises, finds: That a rehearing of this cause should be denied, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the petition for a rehearing of this cause be and the same is hereby denied.

138 UNITED STATES OF AMERICA,
Territory of Oklahoma, } *ss*:

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 137 pages, numbered from one to one hundred thirty seven, inclusive, are a true and com-

plete transcript of the record and all proceedings in said supreme court in the case of The City of Oklahoma City, plaintiff in error, *vs.* Frank McMaster, defendant in error, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 29th day of October, 1903.

[Seal of Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

139 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error. } 1126.

Error to district court of Oklahoma county.

Brief of Plaintiff in Error.

John H. Wright, city attorney, and
Selwyn Douglas, attorneys for plaintiff in error.
Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Cert.

140 In the Supreme Court of the Territory of Oklahoma.

THE CITY OF OKLAHOMA CITY, Plaintiff in Error,
vs.
FRANK MCMASTER, Defendant in Error.

Error to district court of Oklahoma county.

Brief of Plaintiff in Error.

Statement of facts for plaintiff in error.

On the 22nd day of September, 1899, the defendant in error as plaintiff in the district court of Oklahoma county, filed his
141 petition in ejectment containing the averments required by statute, against the plaintiff in error, defendant in the said district court for the recovery of the possession of a certain portion

of Grand avenue, in Oklahoma City, the said Grand avenue being one of the principal streets and thoroughfares of said city.

The said portion of said street so sought to be recovered in said action, is described in said petition as being a piece of land 50 feet by 140 feet, bounded as follows:

Commencing at a point in said city of Oklahoma City, on the southeast corner of block twenty-three (23) being the plat now in use of said city, and running thence southerly on a straight line with the west line of Broadway, as shown by said plat thirty-three and ten one hundredths (33 10-100) feet from the southeast corner of the block aforesaid to the place of beginning, thence west from said place of beginning one hundred and forty (140) feet, thence south at a right angle with the line aforesaid fifty (50) feet, thence east parallel with said east and west line first named, one hundred and forty (140) feet, thence north parallel with said north and south line fifty (50) feet to the place of beginning, and for damages for withholding possession of said parcel of land.

Case-made, pages 2 and 3.

A general demurrer of the city to said petition was by the court overruled, and afterwards on the 24th day of November, 1899, the city filed its answer to said petition, alleging among other things as a defense to said action that the parcel of land sued for is a part of the original townsite of Oklahoma City, and is included in and is a part of Grand avenue, a public highway and street of said city as the same is shown on original plat and survey of said city, which
142 was approved by board No. 2 of townsite trustees of Oklahoma City, on the 6th day of September, 1890, and recorded under and by direction of said board in the office of the register of deeds of Oklahoma county, Territory of Oklahoma, on the 8th day of September, 1890, in Book No. One (1) of plats, of the records of said county, at pages 2 3 and 4 of said book; and that said Grand avenue with the said parcel of ground claimed by said McMaster included therein, was and had been for more than one year prior to the approval of said plat and survey by said townsite board and the filing of said plat so approved in the office of the said register of deeds, and had been at all times thereafter, used and occupied exclusively as a public highway and street of said city by the inhabitants of said city and Territory and was so exclusively used as a public highway long before the organization of said city as a municipal corporation, and that said McMaster was never at any time in possession of said parcel of land and had no interest therein.

See case-made, pages 9 and 10.

Thereafter, on the 5th day of February, 1900, said McMaster filed his reply to said answer denying the allegations of said answer.

See case-made, page 12.

The evidence introduced by defendant in error in the court below consisted, *first*, of the patent of the United States to the townsite,

trustees, *second*, certain findings purporting to have been made by Hon. John H. Burford in the district court of Canadian county on the — day of May, 1892, in an action pending therein where Frank McMaster was plaintiff, and Edgar N. Sweet, Levi E. Coe and David H. Hammons were defendants.

143 See Exhibit B.

Case made, pages 31, 32 and 33.

Third, a certain order made by Hon. John H. Burford, on the 13th day of October, 1893, in the district court of Kingfisher county in some kind of an action therein appearing to be pending in which said Frank McMaster was plaintiff and Edgar N. Sweet, Levi E. Cole and David H. Hammons, townsite trustees' board No. 2 and their successors were defendants.

See case-made, pages 34 and 35.

Fourth, the testimony of John Holzapfel, who testifies to the rental value of said parcel of land, and that said parcel of land is a part of Grand avenue, a street of said Oklahoma City.

Case-made, pages 16, 17, 18 and 19.

Thereupon the defendant in error rested his case in the court below, and the plaintiff in error, the city, demurred to the said evidence introduced by said defendant in error and filed its demurrer to said evidence, which demurrer was overruled by the court, to which order and decision of the court overruling said demurrer to the evidence the defendant city excepted.

Case-made, pages 19, 20, 22, 23.

Thereupon the defendant city offered in evidence by C. J. Bowman, register of deeds, and read, *first*, the final receipt of the local land office to the townsite trustees of said Oklahoma City bearing date of September 3, 1890.

Case-made, pages 23 and 37,

and *second*, the original townsite plat of said city, which
144 was approved by board No. 2 of townsite trustees on the 6th day of September, 1890, and filed in the office of the register of deeds of Oklahoma county, and *third*, the order of the board of county commissioners made on the 15th day of July, 1890, incorporating Oklahoma City as a municipal corporation.

Case-made, pages 24, 37 and plat following, Exhibit F.

Thereupon the city rested its case. The plaintiff, Frank McMaster, who is defendant in error here, then offered to prove by Bunkey's book and by the testimony of Mr. Sidney Clark, certain matters which the court could not do otherwise than to exclude for the reason that it was incompetent and not the best evidence and was in any event wholly immaterial; and plaintiff in error also offered to read in evidence over the objections of the city, a petition for incorporation of said city as shown by Exhibit I, in the record.

Case-made, pages 43 to 50 inclusive.

The above constituted all the evidence in the case, and thereupon the court below rendered judgment in favor of McMaster and against the city, and in the same entry set aside and vacated the same and ordered a second trial of said action and continued said cause to the next term of said court.

Case-made, pages 53 and 54.

Afterwards, on the 21st day of January, 1901, McMaster filed his motion to set aside said order of the court granting a second trial of said cause, supporting his motion by a certain certificate of Hon. William Jenkins, secretary of Oklahoma Territory.

Case-made, pages 56 and 57.

145 And afterwards, on the 11th day of February, 1901, said defendant in error, filed a second motion to set aside said order granting such second trial and to reinstate said judgment.

On the 29th day of April, 1901, the court below sustained the motion to reinstate said judgment, to which order of the court sustaining said motion the defendant city then and there excepted, and thereafter on the same day the city filed a motion for a new trial of said action.

Case-made, pages 61, 63, 64.

Afterwards, on the 1st day of June, 1901, said cause came on to be heard upon said motion of the city for a new trial, and thereupon the defendant in error moved that said motion for new trial be stricken from the files of said court, on the ground that same was not filed within three days after the rendition of said judgment, which said motion or defendant in error, McMaster, to strike said motion for new trial from the files and not consider the same was overruled by the court, to which order the defendant in error excepted, and thereupon said motion of the city for new trial was submitted and argued by counsel, and was by the court overruled, to which order of the court overruling said motion for new trial the said City of Oklahoma City then and there excepted, and thereupon time was allowed to said city as plaintiff in error herein to make a case for the Supreme Court, and the same was accordingly done.

Case-made, pages 66, 67.

Authorities and Argument.

It is admitted that a *final receipt* for the quarter section in which the parcel of land in controversy is situated, and of which
146 it is a part, was issued by the United States local land office at Oklahoma City to townsite board No. 2, on the 3rd day of September, 1890.

It is also admitted that United States patent for said quarter section was afterwards issued, on the 1st day of October, 1890, to said townsite board, for the use of the inhabitants on said land.

It is also admitted that the said townsite board No. 2, on the 6th day of September, 1890, adopted, approved and filed a plat of the quarter section of land described in said patent, as a townsite plat of and for the original townsite of Oklahoma City, and that by such plat the parcel of land claimed by said defendant in error, was thrown into the street, known and designated as Grand avenue in said Oklahoma City.

Case-made, pages 16 and 32.

The defendant in error bases his right to recover possession of the parcel of land in controversy in this section, subject to the foregoing matters, *wholly upon certain findings* made by Hon. John H. Burford, judge of the second judicial district, in a certain action pending in the district court within and for Canadian county, in which said defendant is error, McMaster, was plaintiff, and Edgar N. Sweet, Levi E. Coe and David H. Hammons were defendants, and on a certain alleged judgment or decree, rendered in said last named cause, at Kingfisher, in Kingfisher county, on the motion of said defendant in error on the 13th day of October, 1893.

Case-made, pages 31 to 35 inclusive.

Counsel for plaintiff in error here admit that if said defend-
147 ant in error is and was the owner of said parcel of land according to his contention, then he is entitled to recover damages for the withholding of the possession of said land by plaintiff in error for a period of three years prior to the commencement of this action in the court below, and since, at the rental value of $250 per year as sworn to by John Holzapel.

But defendant in error's right to recover such damages depends of course upon the question of his ownership and right to the possession of said parcel of land. Consequently we shall have nothing further to say concerning said question of damages, but will address ourselves entirely to the question as to whether or not the evidence in the case entitles the defendant in error to recover possession of said parcel of land in controversy.

If the defendant in error is the owner, in law or equity, of said parcel of land, it is because of his settlement thereon and other facts as found by and in the findings of Judga Burford in the case of Defendant in Error *vs.* The Townsite Trustees in Canadian county on or about the — day of May, 1892, and the so-called judgment rendered in said cause at Kingfisher, in Kingfisher county, on the motion of said defendant in error on the 13th day of October, 1893.

These findings and that so-called judgment, taken together, are all the evidence in this case to show that defendant in error ever at any time before the commencement of this suit in the court below, claimed possession or title or any right by original settlement or otherwise, to said parcel of land.

These findings constitute the only evidence in this case that
148 defendant in error was ever at any time in possession of or occupying said parcel of land.

There is not another particle of evidence on that point.

And we respectfully submit with due deference to everybody, including the court below, that, inasmuch as the plaintiff in error was not a party to the proceeding in which those findings were made, such findings were not competent evidence to prove any fact in this case, they were not competent to prove possession or right of possession or title or rights of any kind in favor of defendant in error and against the plaintiff in error.

But suppose we admit for the sake of argument, that such findings were competent evidence in behalf of defendant in error, for any purpose in the trial of this case, what then do we discover from an examination of said findings?

We find, among other things, that prior to the conveyance of the quarter section to the townsite trustees, the parcel of land in controversy had been "thrown into the street called Grand avenue," by the adoption of a plat made by the inhabitants.

We also find that defendant in error applied to the townsite board for a deed to said parcel of land on the 21st day of April, 1891.

Said findings also show, if they could possibly be admitted to prove anything in this case, that said parcel of land had been appropriated and used as a street long prior to the conveyance of the quarter section to the townsite trustees, and that the defendant in error was not an occupant of said parcel of land at the time of said conveyance.

Said findings also show that defendant in error applied to
149 the townsite board for a deed to said parcel of land on the 21st day of April, 1891, over seven months after the townsite board No. 2 had adopted, approved and filed its plat of said city and had, by reason of such approval and filing divested itself of any and all title to said parcel of land.

Said findings also show that said McMaster was not an occupant of said parcel of land at the time the United States conveyed the said quarter section to said townsite trustees, but that the same was then occupied as a street by the inhabitants of said city.

In view of the fact that the adoption, approval and filing of the plat on the 6th day of September, 1890, had divested the townsite trustees of title and that defendant in error was not in possession of said parcel of land at the time nor afterwards, and did not apply to the townsite board for a deed until many months thereafter, it appears to us that townsite board No. 2 were powerless to afford defendant in error any relief in the premises at the time he made his application.

City of Guthrie *vs.* Beamer, 3 Okla. 652.

But we desire at this point to revert to the question of the admissibility of the findings of Judge Burford in the Canadian county district court, as evidence for defendant in error in the case at bar, over the objection of plaintiff in error.

All that the record in this case shows concerning these findings is what appears in the entry of findings themselves.

They purport to have been made in the Canadian county district court in an action in which they are entitled.

Whether they were made in an *ex-parte* proceeding against the townsite board or trustees or whether the townsite board had
150 any notice or knowledge of such proceeding the record fails to disclose.

There being nothing in the record whatever, to show that the townsite trustees were notified of the pendency of such proceeding or had any knowledge of its existence or pendency, we are at a loss to understand how they could have been used in evidence in a case in another jurisdiction even against the townsite board itself.

These findings of Judge Burford did not constitute a judgment against the townsite board nor against anyone else.

They were simply findings upon which perhaps a judgment of some kind might have been entered. But no judgment of any kind was ever entered thereon.

The court below was wholly misled by the notion that the so-called judgment entered at Kingfisher, in Kingfisher county, was made in pursuance to and upon said findings made in Canadian county district court, and that said so-called judgment at Kingfisher was for that reason a valid judgment against the townsite trustees or board.

But the court below was clearly in error.

The record shows that the findings of the Canadian county court were made on or before the 11th day of May, 1892, as shown by the certificate of the clerk of the district court of Canadian county.

Case-made, page 33.

An- the certificate and endorsement of the register of deeds immediately following the district clerk's certificate shows that
151 said findings, with the clerk's certificate thereon, were filed for record in the register's office on the 14th day of May, 1892, three days after the date of the clerk's certificate.

Case-made, page 33.

Therefore the so-called judgment entered in Kingfisher county on the 13th day of October, 1893, cannot have been intended to be entered upon said findings of the Canadian county district court or to supplement such findings, for the reason that said so-called judgment does not in any way refer to said findings made on or prior to May 11, 1892, but do distinctly refer to some kind of a decree entered on the 14th day of November, 1892, just six months after the said findings were filed for record in the office of the register of deeds.

We are therefore perfectly safe in declaring that the so-called judgment of the Kingfisher court is not a part of, and does not supplement the said findings, because the said judgment shows for itself that it is not meant to be supplementary thereto and does not pretend to be founded thereon, but upon some other alleged decree which does not appear in evidence in the record of this case.

But suppose the Kingfisher judgment was intended to be founded upon said findings or to be supplementary thereto.

Is it of any validity?

We will not cite authorities upon the question whether a judgment rendered in one county upon a case pending in another county, can be valid, unless the parties to the same are shown to have agreed to it in advance.

Of course it is invalid. It is void from the first. It is precisely as if it had never been made.

Even if it had referred to the findings of the Canadian
152 county district court, it would be absolutely void for the reason that it was not rendered in Canadian county.

As to the findings themselves: Is there anything in the record, any evidence whatever, to show what kind of a judgment the district court of Canadian county would have rendered thereon, if it has ever attempted to render one?

It seems unnecessary for us to insist on the fact or to recite that the so-called judgment rendered in Kingfisher county is void, void *ab initio*, and we would not do so except for the very serious effect it appeared to have on the mind of the court below. It would certainly seem that a judgment rendered in Kingfisher county in a case pending in Canadian county ought not to be seriously considered for any purpose, unless there was something in the record to show that the parties against whom it was rendered had consented to it, or, at least, knew that something of the kind was intended. Especially is this the case when such judgment is not based upon findings of some kind.

A judgment to be valid for any purpose, must be based upon a finding of some kind.

It must have been a verdict of a jury or the findings of the court to support it, or it is erroneous and void.

McKeon *vs.* McDermott, 22 Calif. 667.
Wiley *vs.* Lovely, 46 Mich. 83.
Merc. at. Bank *vs.* Pope, 19 Oreg. 35.
Bates *vs.* Bower, 17 Mo. 550.
Haxton *vs.* McCloven, 132 Ind. 235.
Stansill *vs.* Corning, 21 Mich. 242.
Stahl *vs.* Gotzenberger, 45 Wis. 121.

153 But the Kingfisher judgment is void in any event. It was rendered in a county in a case not pending in that county.

But the findings of Judge Burford in the district court of Canadian county were not competent to establish any fact against the plaintiff in error.

They might be competent evidence in a case against the townsite trustees who were parties to the suit in Canadian county, but not against any other person, municipality, or party not connected with the suit, nor in any way privy to it. In order to make them binding upon the plaintiff in error, the latter should have been made a party to the suit in which the findings were made.

Any other rule would be productive of injustice and probably of the grossest fraud upon innocent parties.

Neither the court below nor the writers of this brief would care to submit a decision in a case where our dearest rights might be annulled in a case we knew nothing about in which the defendant in error or any other man was plaintiff and Edgar N. Sweet or some other person was defendant.

The plaintiff in error is and was wholly a stranger to the proceedings in Canadian county and was and is an entire stranger to the findings or to any judgment that might have been rendered therein.

This is the rule, and it is universal in its application, that all who are not parties to a judgment nor privies to the parties thereto, are wholly free from the estoppel of the judgment, and as one of our greater text writers on the subject says, "*it is a canon of general jurisprudence.*"

154 Black on Judgments, vol. 2, sec. 600, page 717.
See the numerous cases cited in Black under above section.
See, particularly, Foster *vs.* Powers, 64 Texas, 247.

In discussing this principle, that judgments do not bind strangers, Mr. Black says:

"That the rule is firmly imbedded in our laws is attested by a "multitude of cases."

"It was said in the leading case on this subject: "What has been "said at the bar is certainly true as a general principle, that a trans- "action between the parties in a judicial proceeding, ought not to "be binding upon a third party; for it would be unjust to bind any "person who could not be admitted to make a defense or to examine "witnesses, or to appeal from a judgment he might think erroneous; "and, therefore, the depositions of witnesses in another case in proof "of a fact, *the verdict of a jury finding the fact, and the judgment of the "court upon the facts found*, although evidence against the parties and "all claiming under them, are not in general to be used to the preju- "dice of strangers."

Kingston's case, 2 Smith Lead. Cas. 424.

Mr. Black continues: "And in another case, 'It contravenes the "first principle of justice, to hold a man bound by a judgment against "which he has neither an opportunity to defend, or notice in any "way that he was to be directly involved in its consequences.'"

Morrison *vs.* Mullin, 34 Pa. St. 12.

He also quotes with approval the language of the court in
155 the case in 64 Texas, above cited: "No person can be di- "vested of title to his property in a suit between other par- "ties of which he has no legal notice, and *a judgment rendered in "such a suit is not binding upon him*, and *is not admissible in evidence "against him in any future proceeding in which the title to the property "is in controversy.*"

Foster *vs.* Powers, 64 Texas 247.

He continues, "*The same rule holds good in chancery as well as at law.*"

But we insist that the so-called judgment entered in "open court at Kingfisher," in the district court of Kingfisher county, even if intended to be based upon the "findings" of the court in Canadian county, (which is clearly not the case) is not a judgment at all.

It is absolutely and irredeemably void and of no effect. It is void upon its face. It professes upon its face to be a judgment rendered in Kingfisher county in a suit then pending in Canadian county.

It must have been admitted in evidence in the case at bar upon the theory that it supplemented in some mysterious way, or attached to the "findings" of the district court of Canadian county.

But of course it did nothing of the kind. It was absolutely void because the court had no power, jurisdiction or authority to render any judgment in "open court at Kingfisher in Kingfisher county," in a case not pending in that county.

Certainly the court below was in error, in admitting the "findings" made in the Canadian county district court as evidence against the plaintiff in error, unless there was something in the record to show (1) that the plaintiff in error was a party or privy to
156 the case in which the findings were made, and (2) that the said findings had been supplemented and carried into judicial effect by a proper judgment rendered therein.

The findings of a court in a case tried by the court, are equivalent to a verdict of a jury in a case tried by such jury.

But the findings of a court are not a *judgment*, any more than the verdict of a jury is a *judgment*.

Neither the verdict of a jury nor the findings of a court, without a judgment entered thereon, is of any validity either as a matter of estoppel or as evidence.

It is not of itself even a bar to another suit on the same cause of action.

Dunlap *vs.* Robinson, 12 Ohio St. 530.
Benson *vs.* Post, 9 N. W. 684.
Estate of Holbert, 57 Calif. 257.
Smith *vs.* McCool, 16 Wallace, 560. (U. S.)
Auld *vs.* Smith, 23 Kas. 65.

In the Kansas case of Auld *vs.* Smith, above cited, the court says: "Final judgments are of course adjudications, and findings of courts "and verdicts of juries and reports of referees may also sometimes "be considered as adjudications, but they can be considered such "only in cases where they, themselves, are *final*, or in cases where a "final judgment has afterwards been rendered upon them sustaining and confirming them."

Freeman on Judgments, sec. 251.

And we beg to call attention to the fact that these findings were made by the district court of Canadian county over nine years ago, and it is perhaps somewhat doubtful whether a valid judgment could

be rendered upon them at this time. But this would become
157 pertinent only in case of a suit brought after rendition of such a judgment.

At any rate it is clear that no valid judgment *has been rendered* upon the findings, and therefore they could not be admitted in evidence, not even in a suit against the townsite board No. 2 itself. How, then, can they be competent as evidence against the plaintiff in error in the case at bar?

But if these findings had been supported and followed by a regular and valid judgment thereon, such findings and judgment would not affect the rights of plaintiff in error which had obtained an absolute dedication of the parcel of land in controversy by virtue of the plat of the townsite adopted, approved and filed by the townsite board No. 2 on the 6th day of September, 1890, long before the commencement of the suit in which said findings were made.

We submit, therefore, that the findings of the district court of Canadian county, unsupported or followed by a valid judgment, were and are not competent evidence against the plantiff in error. That the so-called judgment rendered at Kingfisher, in Kingfisher county, was and is void upon its face, and was and is not competent evidence against the plaintiff in error.

That as said findings and so-called judgment constituted the only evidence in support of the petition of defendant in error, and all the evidence offered by him in the case, the demurrer of plaintiff in error to the evidence offered by defendant in error ought to have been sustained.

We further submit, if said evidence of defendant in error had been competent, that the fact that the plat of the townsite was adopted and approved on the 6th day of September, 1890, by the
158 townsite trustees, divested said trustees of title to said parcel of land, and defeats the right of defendant in error to recover in this action.

But the certainty that the findings of the court in Canadian county are not supported or followed by any valid judgment makes such findings incompetent as evidence in this case.

As these findings and said so-called judgment of the court in Kingfisher county are all the evidence that supports the judgment of the court below in this case it follows that the judgment must be reversed and a judgment rendered for plaintiff in error by this court.

Respectfully,

JOHN H. WRIGHT,
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SELWYN DOUGLAS,
Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 19,127. Oklahoma Territory supreme court. Term No. 137. The City of Oklahoma City, plaintiff in error, *vs.* Frank McMaster. Filed November 6th, 1903. File No. 19,127.